COMPARATIVE ADMINISTRATIVE LAW

AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY

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VOLUME I.

ORGANIZATION

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PREFACE.

It will be well perhaps to explain the purpose of the book which is herewith submitted to the public. For it is necessary, in order to do justice to all concerned, that the author apprise his readers at the outset that he has not attempted to treat exhaustively of the entire domain of administrative law. His intention has been rather to set forth, in the first place, the methods of administrative organization adopted in the four countries whose law is considered, namely, the United States, England, France, and Germany, and to state, in the second place, somewhat in detail, the means of holding this organization up to its work, and of preventing it from encroaching on those rights which have been guaranteed to the individual by the constitution or laws. The treatment of this control over the administration has made it necessary to include a summary of the forms and methods of administrative action; for without an understanding of them an adequate conception of the control over the administration would be impossible of attainment. This particular portion of the work is confessedly the least complete, but the author considers this incompleteness a virtue rather than a fault, if he has been able, as he hopes he has, in the few pages devoted to this matter, to make it

clear to his readers, in what manner the administration acts, and even to suggest in this or in the other portions of the work the directions of the action of the administration. A detailed consideration of the directions of administrative action, as well as of its methods, is, it is true, a necessity for the practising lawyer. It would, however, be of slight interest if not a positive disadvantage to the beginner in the study of administrative law; while the general reader, for whose use this work is also intended, would probably be deterred by the magnitude of the work presented by such a consideration from entering upon the study of administrative law at all. This study the author naturally considers to be of the greatest importance. The great problems of modern public law are almost exclusively administrative in character. While the age that has passed was one of constitutional, the present age is one of administrative reform. Our modern complex social conditions are making enormous demands of the administrative side of the government, demands which will not be satisfied at all or which will be inadequately met, unless a greater knowledge of administrative law and science is possessed by our legislators and moulders of opinion. This knowledge can be obtained only by study, and by comparison of our own with foreign administrative methods. It is in the hope of pointing out the way to future students in this subject that the following pages have been written. The needs of the legal practitioner have been met elsewhere by excellent treatises on the most important branches of administrative law, such as that of Judge Dillon on *The Law of Municipal Corporations*, that of Judge Cooley on *The Law of Taxation*, and that of Mr. Mechem on *The Law*

of Officers, on which the author has placed great reliance. The details of foreign law also may be found in excellent treatises, either French or German, to which continual references have been made in the text. Finally the book has been written with the end in view of supplementing the work done by Professor John W. Burgess in his *Political Science and Comparative Constitutional Law*. For this reason as well as owing to the lack of space, all matters of a distinctively constitutional character have been omitted, and the student has been referred to Professor Burgess' work. It is only where a comprehension of administrative subjects has absolutely required a knowledge of their constitutional foundations that the author has ventured to treat even in the most cursory manner of constitutional questions.

It is only fair to add also that the work was begun by first studying with considerable care books on foreign administrative law. This was necessary, owing to the complete lack of any work in the English language on administrative law as a whole, and was possible and profitable owing to the richness of the literature of foreign administrative law. After a method of treatment had thus been obtained, the attempt was made to apply it to American law. American conditions necessitated numerous and important modifications of this method of treatment, but the author is conscious of the fact that a foreign point of view will often be noticed, a fact for which, however, he does not consider an apology necessary. For in the present stage of the study it is to foreign writers that we must look for all scientific presentations of the subject.

The author deems it necessary to acknowledge how much he is indebted to the published works and personal influence felt in lectures he has heard, of Professor Rudolph von Gneist, of the University of Berlin, Germany. Great reliance has been placed also on the excellent work, contained in the *Introduction to the Local Constitutional History of the United States*, of Professor Howard, of Leland Stanford, Jr., University, California, whose conclusions have been in most cases accepted without question, and re-stated in the text. He desires also to express his indebtedness to the many friends from whom he has received most helpful suggestions, and particularly to Professors John W. Burgess and Edwin R. A. Seligman of Columbia College, and to Doctor Ernst Freund of the New York Bar, who have read either all or parts of what he has written. The author finally desires to call the attention of his readers to the fact that in all of the cross references made in the text, the first volume is to be understood unless the number of the volume is given.

Trusting that an indulgent public will pardon those errors which will creep in, notwithstanding the greatest care, he submits with hesitation a work on a new subject, and hopes that what he has done will at any rate have the effect of inducing others to study what has been of the greatest interest to him and what he believes all interested in social problems should know something about.

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COLUMBIA COLLEGE,
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COMPARATIVE ADMINISTRATIVE LAW.

TABLE OF CONTENTS.

VOLUME I. ORGANIZATION.

BOOK I. THE SEPARATION OF POWERS.

CHAPTER I. ADMINISTRATION.

CHAPTER II. ADMINISTRATIVE LAW.

CHAPTER III. THE THEORY OF THE SEPARATION OF POWERS.

CHAPTER IV. EXCEPTIONS TO THE THEORY OF THE SEPARATION OF POWERS.

CHAPTER V. THE RELATION OF THE EXECUTIVE TO THE OTHER AUTHORITIES.

CHAPTER IV. THE EXECUTIVE POWER AND AUTHORITY IN FRANCE.

CHAPTER V. THE EXECUTIVE POWER AND AUTHORITY IN GERMANY.

CHAPTER VI. THE EXECUTIVE POWER AND AUTHORITY IN ENGLAND.

DIVISION II. EXECUTIVE COUNCILS.

CHAPTER I. THE EXECUTIVE COUNCIL IN THE UNITED STATES.

CHAPTER II. THE EXECUTIVE COUNCIL IN FRANCE.

CHAPTER III. THE EXECUTIVE COUNCIL IN GERMANY.

CHAPTER IV. THE ENGLISH PRIVY COUNCIL.

DIVISION III. HEADS OF DEPARTMENTS.

CHAPTER I. DISTRIBUTION ON BUSINESS AND METHOD OF ORGANIZATION.

CHAPTER II. TERM AND TENURE OF THE HEADS OF DEPARTMENTS.

CHAPTER III. POWERS AND DUTIES OF HEADS OF DEPARTMENTS.

BOOK III. LOCAL ADMINISTRATION.

CHAPTER I. HISTORY OF RURAL LOCAL ADMINISTRATION IN THE UNITED STATES.

CHAPTER II. RURAL LOCAL ADMINISTRATION IN THE UNITED STATES AT THE PRESENT TIME.

CHAPTER III. MUNICIPAL ORGANIZATION IN THE UNITED STATES.

CHAPTER IV. GENERAL CHARACTERISTICS OF LOCAL ADMINISTRATION IN THE UNITED STATES.

CHAPTER V. LOCAL ADMINISTRATION IN ENGLAND.

CHAPTER VI. THE FRENCH SYSTEM OF LOCAL ADMINISTRATION.

CHAPTER VII. LOCAL ADMINISTRATION IN PRUSSIA.

TABLE OF CASES CITED.

BOOK I.

THE SEPARATION OF POWERS.

CHAPTER I.

ADMINISTRATION.

I.—Administration as a function of government.

THE word administration is used in several senses. Thus we speak of the administration of an estate, the administration of a business, and of the administration of government.[1] In the following pages the word administration will be used with reference to government. But even when used with reference to government, this word has as many as three meanings. In its widest sense, it is used to indicate the entire activity of the government; again in a narrower sense, the entire activity of the government with the exception of that of the legislature; in a third and narrowest sense, the activity of the government with the exception of the activity of both the legislature and the courts.[2] Administration in this narrowest of senses, which is the proper sense for it as indicative of a function of government, is the activity of the executive officers of

[1] Stengel, *Deutsches Verwaltungsrecht*, 1.

[2] Kirchenheim, *Einführung in das Verwaltungsrecht*, 2.

the government. The government administers when it appoints an officer, instructs its diplomatic agents, assesses and collects its taxes, drills its army, investigates a case of the commission of crime, and executes the judgment of a court. Whenever we see the government in action as opposed to deliberation or the rendering of a judicial decision, there we say is administration. Administration is thus to be found in all the manifestations of executive action. The directions in which this action manifests itself depend upon the position of the state and the duties of the government.

In the first place, the state occupies a position among other states; it is a subject of international law, and as such has rights and duties over against other states and must enter into relations with them. The management of these relations calls for certain executive action. This action constitutes a branch of the general function of administration, *viz.*, the Administration of Foreign Relations.

In the second place, the state must have means at its command to repel any attempts which may be made against its existence or power by other states or against its peace and order by its own inhabitants. In other words, it must have an army and in most cases a navy. The executive action made necessary by the existence of a military force constitutes another branch of administration, *viz.*, the Administration of Military Affairs.

In the third place, every government must do something to decide the conflicts which arise between its inhabitants relative to their rights. This duty makes the existence of courts necessary; and they in turn re-

quire executive action, which forms a third branch of administration, *viz.*, the Administration of Judicial Affairs.[1]

In the fourth place, in order that the government may perform all its duties, it must have pecuniary means. The management of its financial resources forms another and fourth branch of administration, *viz.*, the Financial Administration or the Administration of Financial Affairs. The theories of some political philosophers would almost confine the action of government to these branches of administration; but no government was ever actually so confined by its constitution; and every modern state has recognized that it is the duty of the government to further directly the welfare, both physical and intellectual, of its citizens. This it does by the formation and maintenance of a system of means of communication, of an educational system, of a system of public charity, *etc.* How far the action of the government shall extend in this direction; what it shall do and what it shall leave to the private enterprise of its citizens; are most important political questions, but questions which must be answered by political and social science.[2] The duties performed by the government in furthering the welfare of its citizens may be classed together as internal

[1] By this term is meant not the decision by the courts themselves of the controversies which may arise, since by the definition of the term administration which has been adopted this branch of governmental activity has been excluded from the conception of administration; but the activity of the executive organs of the government to the end that the courts be in existence and in a position to discharge their duties, *i. e.* the appointment, discipline, and distribution of the judges and their subordinate officers. This is a side of what is ordinarily called the administration of justice, which in most countries is easily distinguished from the rendering of judicial decisions.

[2] *Cf.* Burgess, *Political Science and Comparative Constitutional Law*, I., 83.

affairs; and the executive action of the government necessitated by the performance of these duties forms a fifth branch of administration, *viz.*, the Administration of Internal Affairs.

These five branches of administration embrace all the functions which the government is called upon to discharge whatever may be its form of organization. In the fifth branch—the administration of internal affairs—we find the greatest difference between states in the functions discharged by the government—a difference which is dependent upon the political philosophy which obtains.[1]

Such, then, is the meaning which will be given in the following pages to the term administration considered as a function of government. It is the entire activity of the government, exclusive of that of the legislature and the purely judicial work of the courts, in the fivefold direction of foreign, military, judicial, financial, and internal affairs.

II.—The administration as an organization.

The government is, however, simply an ideal conception with no physical existence. In order that it may make itself felt in the world of action it must have agents capable of physical action who are to represent it. These agents must be properly organized for each

[1] Several of the latest continental writers on administration have endeavored to differentiate another branch of administration, which they call the general administration of the country. See Kirchenheim, *op. cit.*, 5; Stengel, *Deutsches Verwaltungsrecht*, 5. They classify under this branch such matters as the elections and the relations of the government with the church. This attempted formation of a sixth branch of administration is, however, contrary to general usage and seems unnecessarily to complicate the subject, as all matters may, without doing them great violence, be classed under the appropriate one of the five branches distinguished.

of the five branches of administration which have been distinguished: and further in order to secure unity in their action in these various directions there must also be organized an authority at the head of this administrative personnel—an executive chief. On this account the study of administration is not taken up exclusively with a consideration of the rules of administrative action; but a large part of the time devoted to this study must be given to the subject of administrative organization. Indeed, the importance of the administrative organization is so great that the term administration is often used to indicate the entire administrative organization extending down from the executive chief to the most humble of his subordinates. The word administration thus means, at the same time that it indicates a function of government, the executive organization of the state. Administration is the function of execution; the administration is the totality of the executive and administrative authorities.

CHAPTER II.

ADMINISTRATIVE LAW.

I.—Definition.

In this country and in England, where no serious attempt has been made to classify the law in accordance with the relations which it governs, the term administrative law is almost meaningless. While we speak with perfect propriety of administration as indicative of a function of government, and of the administration as an executive organization, there is hardly an American or English lawyer who would recognize the existence of a branch of law called administrative law. Indeed as eminent a writer as Professor Dicey claims[1] that "in England and in countries which, like the United States, derive their civilization from English sources, the system of administrative law and the very principles on which it rests are unknown." He does not, however, mean by this to deny the existence of an administrative law in the true continental sense, but simply the existence of his conception of the French *droit administratif*, a conception which appears to be quite unwarranted. The general failure in England and the United States to recognize an administrative law is really due, not to the non-existence in these

[1] *The Law of the Constitution*, 3rd Ed., 304–306.

countries of this branch of the law but rather to the well-known failure of English law writers to classify the law. For not only has there always existed in England, as well as in this country, an administrative law, in the true continental sense of the word, but this law has exercised on Anglo-Saxon political development an influence perhaps greater than that exerted by any other part of the English law. Of late years, with the great awakening on the continent of Europe of interest in administrative subjects, the term administrative law—in reality a simple translation of a French expression—has gradually crept into our legal vocabulary, and at the present time has obtained recognition from some of the most advanced legal thinkers.[1] The use of the term may therefore be regarded as perfectly proper; though that use must be accompanied by an explanation. Adopting the system of legal classification now generally admitted to be the most desirable, *viz.*, according to relations governed, we find that administrative law is that part of the law which governs the relations of the executive and administrative authorities of the government. It is therefore a part of the public law, but it is only a part. All such rules of law as concern the function of administration, and only such rules of law, belong to administrative law. Further, since the function of administration depends for its discharge upon the existence of administrative authorities, whose totality is called the administration, adminstrative law is concerned not alone with the relations of the administrative authorities but

[1] *E. g.* see Holland, *Elements of Jurisprudence*, 4th Edition, 1888, 122, 303, 308–311; Lightwood, *The Nature of Positive Law*, 402; *The Juridical Review*, II., No. 5, 13; Stimson, *American Statute Law*, v.

also with their organization. Administrative law at the same time fixes the offices which shall form part of the administration and determines the relations into which the holders of these offices shall enter.

In so far as it fixes the organization of the administrative authorities, administrative law is the necessary supplement to constitutional law. While constitutional law gives the general plan of governmental organization, administrative law carries out this plan in its minutest details. But administrative law not only supplements constitutional law, in so far as it regulates the administrative organization of the government; it also complements constitutional law, in so far as it determines the rules of law relative to the activity of the administrative authorities. For while constitutional law treats the relations of the government with the individual from the standpoint of the rights of the individual, administrative law treats them from the standpoint of the powers of the government. Constitutional law, it has been said, lays stress upon rights; administrative law emphasizes duties.[1] But while administrative law emphasizes the powers of the government and the duties of the citizen, it is nevertheless to the administrative law that the individual must have recourse when his rights are violated. For just so far as administrative law delimits the sphere of action of the administration it indicates what are the rights of the individual which the administration must respect; and, in order to prevent the administration from violating them, offers to the individual remedies for the violation of these rights.

Administrative law is therefore that part of the public law which fixes the organization and determines

[1] Boeuf, *Droit Administratif*, iv.

the competence of the administrative authorities, and indicates to the individual remedies for the violation of his rights.

II.—Necessity for separate treatment.

It may be asked why is it necessary to separate administrative law from the body of the law? Do the rules of law governing the relations of the administration differ so much from the rules governing the relations of individuals as to necessitate in a logical classification of the law the assignment of a special domain to administrative law? The question is susceptible of easy answer so far as the first great class of the rules of administrative law are concerned. The rules of law governing the organization of the administration must be quite different from the rules of law governing the relations of individuals, since the whole purpose of such rules is the public rather than the individual welfare. When we come to the second great class of rules it may, however, well be asked, are there or must there be rules of law for the regulation of the action of the administration different from those which regulate the action of individuals? The government in many cases acts in much the same way as an ordinary individual; and in these cases, it may be urged, might be subjected to the same rules of law which affect private individuals. Thus the government may carry on railroad enterprises, may offer means of communication by carrying the mails, may own large landed properties. In all of these cases the government has many of the characteristics of a private person, and it might be concluded from this fact, that the ordinary rules of private law might be applied to it, that no

special rules of law were necessary. Nevertheless, for the regulation of even these matters, special rules of law are enacted because the government cannot wisely or conveniently be treated as a private person. When it carries a letter the government cannot be regarded as an ordinary carrier of merchandise, because in transacting this business its object is not usually the acquisition of gain but the furtherance of the welfare of the community. This is the great distinction between public and private business.[1]. Therefore the government enacts, for the regulation of the relations into which it enters with those persons who entrust letters to it, rules of law which differ from the ordinary rules of law regulating the relations of carriers, in that they are more favorable to the government. We find a special set of laws which we call postal laws. These form part of the administrative law, since they govern the action of the officers of the administration in the performance of this particular duty of the government.

In other, and indeed in most, cases, however, the government has few if any of the characteristics of a private person. It represents the sovereign power of the land. Through its administrative authorities it demands of the persons in its obedience the sacrifice of their property and curtails their freedom of action. It orders the tearing down of a house and the payment of taxes; it requires those who have charge of persons suffering from a contagious disease to notify the administration and enforces a quarantine against the diseased persons themselves. That the administration must do all of these things is now everywhere recognized; but nowhere is it recognized that it may

[1] *Cf.* Kirchenheim, *op. cit.*, 21; Adams, *Public Debts*, 369.

act in the doing of these things in accordance with its own unlimited discretion.[1] The grant to the administration of such enormous discretionary powers as would be necessary, would prove, indeed has in the past proved, dangerous in the extreme to the maintenance of individual liberty. There has therefore been a continuous attempt on the part of the people to control the discretion of the administration in the exercise of the sovereign powers of the state. This attempt has resulted in the formation of a new body of law which determines and delimits administrative action and discretion; and this body of law is made as a general thing by the legislature, the representative of the people and the supposed protector of individual rights.[2] The administration is thus brought within the law, but it still does not lose its position as the representative of the sovereign power. Therefore, in spite of the great development of popular institutions, at the present time the action of the administration in the most democratic states is easily distinguished in kind from that of private persons.

The result of the position of the administration as the representative of the sovereign is that the law which governs the relations into which it enters as such representative is quite different in many respects from the private law. In this law contract and tort play a very subordinate rôle. While contract and tort lie at the basis of a large part of the private law, in public law and therefore in administrative law there is hardly any room for them, no room for them at all it may be said, except where the government is treated as *fis-*

[1] Kirchenheim, *op. cit.*, 21.

[2] *Cf.* Sarwey, *Allgemeines Verwaltungsrecht*, 37.

cus, i. e. as a subject of private law. For the relations into which the administration enters are not as a rule contractual relations, but find their sources and their limitations rather in obligations or powers conferred by the sovereign power through its representative the legislature; nor are the injuries which the administration as administration commits often torts, but are rather to be classed as *damna absque injuria.* Thus the relations of the administration with the individual resulting from the exercise of the taxing power are almost never contractual relations; taxes are not debts but obligations imposed on the individual by the public law,[1] and are not governed by the principles of the private law. Thus also the relations into which the administration enters with its officers are not governed by the private-law rules affecting the relation of master and servant. For the official relation is not a contractual relation but again a relation formed by the operation of public law.[2] Still again, while the relations of the government with private corporations are by the laws of the United States in many cases governed by contract principles, *i. e.* the clause of the United States constitution preventing a commonwealth from passing a law impairing the obligation of a contract (which is supposed to be found in its charter), the relations of the government with public corporations are governed rather by the rules of public law and are not much affected by the contract idea.[3]

In some of the cases decided by the courts of this country the necessity of the separate study and treat-

[1] See Merriwether v. Garrett, 102 U. S., 472; and Pierce v. Boston, 3 Metc. Mass., 520; *cf.* Cooley, Taxation 2d. Ed. 17, 18.

[2] Butler v. Penna., 18 How. U. S., 402; *infra*, II., p. 3.

[3] See Dartmouth College v. Woodward, 4 Wheaton, 636.

ment of the administrative law as a part of the public law is made particularly apparent. For the result of entrusting the development of the principles of the public law to judges engaged for the most part in the study and application of the principles of the private law, and of the resulting failure on the part of such judges to distinguish public from private relations, has been the application to public relations of the principles of the private law. This is most unfortunate. For in some cases the result of the too great insistence on the idea of contract in these public relations has been to revive in our public law, principles which are characteristic rather of feudal than of democratic states. Thus the decision that a commonwealth which has relinquished its taxing power may forever be precluded from reässuming it because in so doing it impairs the obligation of a contract, results in the formation of a class of persons possessed of privileges of a public and not private character, and privileges which may never be taken from them. This was exactly the feudal idea.[1] Again the decision that a commonwealth, for the same reason, may not amend the charter of a private corporation is another instance of the same tendency. That the public policy of such a decision is bad may be seen from the insertion in the constitutions of most all the commonwealths of a provision which expressly allows charters to be amended in the case of corporations chartered after the putting in force of the constitution. Further the great expansion of the police power by the decisions of the United States Supreme Court is an evidence also of the growing feeling

[1] See New Jersey v. Wilson, 7 Cranch, 164; Cooley, *Taxation*, 67; Burgess, *Political Science, etc.*, I., 238.

that the idea of contract has been applied unjustifiably in the relations of the public law.[1] The position of the administration thus, both when it acts as the man of business, of society, and when it represents the sovereign, is so peculiar that its legal relations must be set aside for separate treatment in any system of legal classification which has regard for actual conditions.

III.—Distinction of administrative law from private law.

While administrative law has a sufficiently distinctive character to justify its assignment to a separate position in a scheme of legal classification, there are many cases in which it is extremely difficult to distinguish it from other branches of the law, many cases also where practical considerations have such weight as to overbalance any desire for logical exactness. This is especially true of some of the points where the domain of administrative law seems to touch upon that of private law.

We find many rules of law which, if we abide by the definition that has been given of administrative law, *viz.*, as that portion of the law which governs the relations of the administration, must be regarded as falling within its borders, but which at the same time have been enacted mainly with the idea of founding or strengthening purely private rights. Such for example are the rules of law governing the registration of legal instruments and the issue of patents. Such rules of law either alter the force of an existing right over against third persons or actually found a new

[1] For the distinction between private and public law, see Benson v. Mayor, 10 Barbour, N. Y., 223, 245.

private legal right and are thus private in character. On account of their character the usual practice is, notwithstanding the fact that they at the same time govern the relations of the administration, to regard them as a part of the private law. That is, all rules of law whose immediate purpose is the promotion of the rights of individuals are parts of the private law whether they govern at the same time the relations of the administration or not.[1] This was the rule of the Roman law. Ulpian says: "*Publicum jus est quod ad statum rei Romanæ spectat, privatum quod ad singulorum utilitatem.*"[2]

IV.—Distinction from other branches of public law.

The endeavor must also be made to distinguish administrative law from the other branches of public law. The distinction between administrative and constitutional law has already been indicated. While constitutional law defines the general plan of state organization and action, administrative law carries out this plan in its minutest details, supplements, and complements it.[3] The distinction between the two is thus one more of degree than of kind. Both treat to a large extent of the same subjects, the latter more in detail than the former, while the latter devotes itself almost entirely to the consideration of the executive organs of the government, since they are the only ones which actually act and administer. The distinction between administrative and international law also is quite clear. While administrative law lays down the

[1] *Cf.* Kirchenheim, *op. cit.*, 22.

[2] *Insts.*, I., sec. 4.

[3] See *supra*, p. 8.

rules which shall guide the officers of the administration in their action as agents of the government, international law consists of that body of usage which it is supposed that a state will follow in its relations with other states. While it is the guide of conduct of a state in its relations with other states, while its observance will conduce to peace and its non-observance may lead to trouble, it still cannot be regarded as binding upon the officers of any government considered in their relation to their own government except in so far as it has been adopted into the administrative law of the state. On this account the German jurist Zorn treats international law as external public law.[1]

The usual method of legal classification assigns to the criminal law a place in the public law. If this method is correct it becomes necessary to distinguish the administrative law from the criminal law. Any attempt to make such a distinction, as indeed to distinguish the criminal law from any of the clearly defined branches of the law, will be found, however, to present almost insurmountable difficulties. The conclusion is irresistible that from the scientific point of view the criminal law does not occupy any well defined position in the legal system separated in kind from the distinct branches of the law. It consists really of a body of penal sanctions which are applied to all the branches of the law.[2] A great many of the rules of all the branches of the law are found to require such sanctions in order to ensure their observance. Thus certain rules of law governing the relations of individuals one with

[1] *Das Reichsstaatsrecht*, II., 419; *cf.* Gumplowicz, *Das Oesterreichische Staatsrecht*, 348.

[2] *Cf.* Boeuf, *op. cit.*, iv.; Lightwood, *The Nature of Positive Law*, 396–402.

another are found to be practicably unenforceable under any system of private actions. The government, therefore, steps in and gives them a penal sanction. The necessities are the same in other branches of the law. Penal sanctions often become necessary. The rules of law imposing these sanctions come to form a system of law, to which the name of criminal or penal law is attached. This law sanctions and protects all branches of the law without itself forming a distinct branch of the law. But while this law of penal sanction may not thus properly be regarded as a distinct portion of the law in the same way that the administrative law is a distinct portion of it, still the application of sufficiently rigorous penalties to enforce obedience to the law and the preservation at the same time of the rights of the individual present problems of such importance as to demand for their solution separate methods of thought and treatment, and to have brought it about that the law which imposes penal sanctions is regarded, and properly regarded, as forming a separate part of legal study. A science of penalties, *viz.*, penology, has also been developed, in accordance with whose theories the criminal law is moulded. It is thus seen that the rules of law which have been protected by a penal sanction may be really administrative in character. If they are of this character the student of administrative law may not, simply because they are thus protected, dismiss them from his consideration on the ground that they are a part of the criminal law. For, indeed, one of the most common and efficient means of enforcing a rule of administrative law is to give it a penal sanction, and the mere affixing of a penalty to

the violation of a rule of administrative law does not deprive such rule of law of its administrative character.[1] Nor does the mere imposition of a penalty of necessity make the rule of law to the violation of which the penalty is imposed a rule of criminal law in the sense that it must be strictly construed.[2] This comes out particularly clearly in the distinction which is so often made between crimes and police offences.[3]

[1] See *Infra*, II., p. 106.

[2] See Taylor *et al.* v. U. S., 3 How., 197, 210, where Judge Story says: "The judge was therefore strictly accurate when he said [in his charge] 'it must not be understood that every law which imposes a penalty is therefore, legally speaking, a penal law, that is a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of public wrong or to effect a public good, are not, in the strict sense, penal acts although they may inflict a penalty.' It is in this light I view revenue laws, and I would construe them so as most effectually to accomplish the intention of the Legislature in passing them." See also Cliquot's Champagne, 3 Wall., 114, 145; Smythe v. Fiske, 23 Wall., 374.

[3] See Wharton, *Criminal Law*, 9th Ed., I., secs. 23a and 28; also Oshkosh v. Schwartz, 55 Wisc., 483; Commonwealth v. Willard, 22 Pickering, 476; U. S. v. Barrels of Spirits, 2 Abbott's U. S., 305, 314; Cooley, *Taxation*, 2d Ed., 270.

CHAPTER III.

THE THEORY OF THE SEPARATION OF POWERS.

It has been shown that administration is to be found in the activity of the government exclusive of that of the legislature and that of the courts, *i. e.* in the activity of the executive organs of the government. The differentiation of three somewhat separate governmental authorities was the result of the political history and experience of Europe and especially of England. Historically it may be shown that all governmental power was at one time expressed in all cases in final instance by a single organ, *viz.*, the early mediæval monarch. Experience proved, however, that certain expressions of it should be made by the state, *i. e.* by the constitution-making power, and not by the government at all. This resulted in the distinction of the state from the government. Experience also showed that in the case where this governmental power should be expressed by the government it is a deliberative body largely independent of any other governmental organ which should act in a series of instances; that in another series it is an executing organ, largely separate from and independent of all other governmental authorities which should act; and that finally in another series of cases duties should be imposed upon a third series of authorities forming the judiciary. These three authorities

were called respectively the legislature, the executive, and the judicial authority. This differentiation of governmental authorities was first noticed in modern times by Locke and Montesquieu, the latter of whom based upon this fact his famous theory of the separation or distribution of powers. In his great work on the *Esprit des Lois*, he first distinguished three great powers of government, *viz.*, the legislative, the executive, and the judicial, and then insisted on the importance of entrusting each of the powers to a separate authority distinct from and independent of the others.[1] This theory was very generally adopted by the political science of the time immediately succeeding Montesquieu, and, in a somewhat more extreme form than was probably believed in by Montesquieu himself, came to be regarded as almost a political axiom, which should lie at the basis of the political organization of all civilized states.[2]

Modern political science has, however, generally discarded this theory[3] both because it is incapable of accurate statement, and because it seems to be impossible to apply it with beneficial results in the formation of any concrete political organization. While it is true, says a judge of the supreme court of North Carolina[4] that "the executive, legislative, and supreme judicial powers of the government ought to be forever separate and distinct, it is also true that the science of government is a practical one; therefore, while each should firmly maintain the essential powers belonging to it, it cannot

[1] *Esprit des Lois*, book xi., chap. vi.

[2] For example, the Constituent Assembly of France laid it down in 1789 as a rule that a country in which the separation of powers is not determined, does not have a constitution. *Déclaration des droits de l'homme et du citoyen*, art. 16.

[3] Kirchenheim, *op. cit.*, I.

[4] Brown v. Turner, 70 N. C., 93, 102.

be forgotten that the three co-ordinate parts constitute one brotherhood whose common trust requires a mutual toleration of the occupancy of what seems to be a 'common because of vicinage' bordering on the domains of each."[1] The flaw in Montesquieu's reasoning, and in that of his followers, was the assumption that the expressions of the governmental power by different authorities were different powers. Seeing that the most important function of the English Parliament was the making of laws, they assumed that the sole duty of the Parliament was the making of laws, and that it alone possessed that power. This, indeed, as every one knows, was not the fact, but even had it been the fact, all that could be logically deduced from it was that the power of the English legislature consisted in the making of laws, and that this was the function of the Parliament alone. But they went a step farther, and, basing their generalization upon an insufficient induction, concluded that what was true of England, or rather what they supposed was true of England, was true everywhere or should be true everywhere. They stated as a truth of political science what was simply a local phenomenon. For just as English experience was at the basis of the differentiation of powers which Montesquieu supposed he had discovered and which undoubtedly existed in a general way in England, so continental experience is at the basis of a somewhat different differentiation of powers. In no two countries do we find exactly the same sphere of action assigned to any one of the governmental authorities which may be differentiated. In some, for example, the executive authority possesses a large power of control over legis-

[1] *Cf.* Sarwey, *op. cit.*, 26.

lation and over the policy of the government, in others almost none; in some the legislative authority has a large power over the formation of the executive authority, in others almost none.[1] What ought in theory to be the sphere of action of each of the different government authorities and what ought to be the sphere of action of the state, *i. e.* the constitution-making authority, are matters which must very largely be governed by the history and political needs of the particular country, and any attempt to impose on a country any hard and fast rule derived either from *a priori* reasoning or from any inductive generalization, based upon the experience of other countries, is rather more apt to meet with failure than success.

But while Montesquieu's theory is therefore lacking in both scientific and practical foundation, still it must be confessed that he stated a principle which has had an immense effect upon the political systems which have been elaborated since his day. His theory still lies at the basis of most political organizations at the present time. It is, however, subject to many exceptions which exceptions are not the same in different states. This theory may be stated as follows. The action of the legislature, which is commonly called the legislative power, but which is in reality merely an expression of the governmental power by the legislature, consists for the most part in the enactment of general norms of conduct for all persons and authorities within the state; the action of the executive authority, commonly called the executive power, is the application of these norms to concrete cases; and finally the action of the judges or the courts, commonly called

[1] *Cf.* Judge Christiancy's remarks in People v. Hurlburt, 24 Mich., 44, 63.

the judicial power, is the settlement of controversies arising between individuals or between individuals and the governmental authorities as to the application of the laws. It may further be added that experience has shown that in general it is best that these different authorities be confined to the exercise of the powers respectively assigned to them by this theory. There must, however, be important exceptions to any such rule; and these exceptions are not the same in the different states, nor should they be the same, since the political experience and needs of no two states are the same. So long as the discussion as to the theory of the separation of powers is carried on from the standpoint of merely what ought to be, little difficulty arises, but if once the scientific theory is formulated as a legal rule, if once it is adopted in the positive law, the difficulties that arise are legion and are insoluble—insoluble simply because the theory is incapable of accurate statement; and therefore the decisions of the courts are necessarily very largely the expression of the subjective opinions of the judges making them. Judge Christiancy frankly admits[1] that the various powers which may be differentiated in accordance with the theory of the separation of powers differ in extent in different states, which is simply another way of saying that the opinions of judges and publicists differ. Nevertheless there is the rule of law that the legislative authority shall not exercise any judicial or executive powers, that the executive shall not exercise any legislative or judicial powers, and that the judicial authority shall not exercise any legislative or executive powers[2];

[1] People v. Hurlburt, 24 Mich., 44, 63.

[2] See the Constitution of Massachusetts, art. xxx., pt. 1.

and an infringement of the rule will lead to the invalidity of the act of the authority so disobeying the rule of the constitution.[1] The student must therefore examine the constitution of his own state and its interpretation by the courts of that state where they have the right to interpret the constitution, if he would know how far the principle of the separation of powers has any legal effect. This is particularly true of the United States both in its national and commonwealth organizations, the principle of the separation of powers being regarded in many cases as a fundamental rule in this country. But he must not expect that the rule in the national government can be reconciled with the rule in the commonwealth governments or that the rules of any two of the commonwealth governments must necessarily be the same. Thus it has been held in some of the commonwealths that even in the absence of constitutional restriction the legislature may not grant a divorce, while in other commonwealths this power has been recognized by the courts as belonging to the legislature.[2] Again it has been held that the courts may not act in the incorporation of municipalities in accordance with the provisions of general incorporating acts, since they are judicial bodies and this is an administrative function.[3] On the other hand, the courts of other commonwealths have regarded this action as perfectly proper.[4]

[1] Gordon v. U. S., 2 Wallace, 561.

[2] Cooley, *Constitutional Limitations*, 6th Ed., 128, 133.

[3] People v. Bennet, 29 Mich., 451; People v. Nevada, 6 Cal., 143.

[4] Kayser v. Trustees, 16 Mo., 88; Galesburg v. Hawkinson, 75 Ill., 152; *cf.* Dillon, *Municipal Corporations*, 4th Ed. I., 265. See also for the construction of what is judicial power under the national constitution Hayburn's case, 2 Dallas, 408, 409; U. S. v. Yale Todd in note to U. S. v. Ferreira, 13 How., 40, 52; Gordon v. U. S., 2 Wallace, 561; Miller on *The Constitution*, VII.

CHAPTER IV.

EXCEPTIONS TO THE THEORY OF THE SEPARATION OF POWERS.

I.—Executive functions of the legislature.

In no constitutional state can the legislature be shut out from all participation in the work of administration. The organic law of all states, even of those which pretend to adopt the theory of the separation of powers, provides that some of the most important administrative or executive acts shall be performed not by the executive but by the legislature. One of these exceptions to the rigid adoption of the principle of the separation of powers is to be found in the usual constitutional provision that the assumption of all obligations by the state shall be made only with the consent of the legislature or upon its initiation.[1] Again we find that the constitutions of most states give to the legislature the power of fixing the budget of the expenses of the government. All such acts performed by the legislature, although they owe their legal force to the fact that they have been performed by the legislature or with its consent, and although they are put into the form of statutes, are nevertheless in fact administrative acts,

[1] Sometimes such obligations are to be assumed, not by the government at all, but by the constitution-making power. See *e. g.* New York constitution, art. vii., sections 9–12.

i. e. acts resembling more the acts usually performed by the administration than those usually performed by the legislature. Therefore in those states in which a formal promulgation of purely legislative acts, *i. e.* general rules of conduct, by the executive authority is necessary, neither do such acts need for their validity such a formality, nor is such a promulgation of them made in practice.[1] Still in form such acts are not administrative acts, but are what have been called by some writers, who lay great stress on the theory of the separation of powers, formal though not material statutes.[2]

Other important acts not of a legislative character performed by the legislature, but which are not even put into the form of statutes, result from the participation of the legislature in the determination of the executive personnel. Thus in the United States a branch of the legislative authority is called upon to approve the appointment of almost all the important executive officers or executive officers are elected by the legislature.[3] Further, the legislature very often possesses the power of removing executive officers from office either by the process of impeachment or by declaring its lack of confidence in the executive authorities.

II.—Legislative functions of the executive authority.

Just as the legislature cannot be shut out of all participation in the work of administration so the executive authority cannot be deprived of all participation in the work of legislation. The executive cannot be assigned

[1] Sarwey, *Allgemeines Verwaltungsrecht*, 26.
[2] *Cf. ibid.*
[3] *Infra*, pp. 103, 135.

to the position of a mere executing officer. Such an application of the theory of the separation of powers has never been accepted in monarchical governments or even in most republics and would lead to most deplorable results.[1] The veto power is one of the most noticeable legislative functions discharged by the executive.[2] It is recognized almost everywhere in the United States as belonging to the executive, at any rate in a limited form.[3] The power of the executive authority to initiate law is also a legislative function. While it is not granted to the executive authority in the United States in either national or commonwealth governments, it is universally recognized as belonging to the executive in France, England, and Germany. The American executive has, however, usually to recommend to the legislature for adoption such measures as he shall deem expedient.[4]

But the executive authority should participate in the work of legislation not only by the power of veto and of initiating law but it also should have the power of issuing orders of more or less general application. The needs of the government make it necessary that many details in the law be fixed less permanently than by statute. No legislature, however wise or far-seeing, can, with due regard for the interests of the people, which differ with the locality and change with the passage of time, regulate all the matters that need the

[1] Sarwey, *op. cit.*, 21.

[2] Montesquieu himself recognized the inadvisability of confining the executive to the function of execution and approves expressly of granting to the executive the veto power. *Esprit des Lois, loc. cit.*

[3] United States Const., art. i., section 7, par. 2; Stimson, *American Statute Law*, section 305.

[4] *Cf.* U. S. Const., art. ii., sec. 3.

regulation of administrative law. A large discretion must be given to the administrative authorities to adapt many general rules of law to the wants of the people. Even though the organic law of the country may in the main confine the executive authority to the execution of the resolutions of the legislature, it still either recognizes in the chief executive authority the power of legislation to fill up details in the administrative law, or it permits the legislature to delegate such a power to him or his subordinates, where no such constitutional power is recognized as belonging to him.[1]

This power of the executive authority to issue general rules is known as the ordinance power; and the ordinances which are issued as a result of the exercise of this power are of three kinds, *viz.*, independent ordinances, supplementary ordinances, and delegated ordinances.[2]

Independent ordinances are those ordinances which are issued by the chief executive authority as the result of his constitutional power to fill up all those places in the law which have not been touched at all by the legislature. In so far as their content is concerned they relate to those portions of the law which have not been regulated in any way by statute. Such an independent power is found as a rule only in monarchical governments.

Supplementary ordinances, like independent ordinances, are issued by the chief executive as a result of his constitutional power of ordinance. They differ,

[1] Sarwey, *op. cit.* 31 *et seq.*; *cf.* U. S. v. Eliason, 16 Peters, 291, 301; Sampson v. Peaslee, 20 How, 571; The Brig Aurora, 7 Cranch, 382, 388; Field v. Clark, U. S. Sup. Court, Oct. term, 1891; U. S. v. Barrows, 1 Abbott, U. S. 351.

[2] Gneist, *Das Englische Verwaltungsrecht*, 1884, 127.

however, from independent ordinances in that they do not attempt to regulate subjects that have not been regulated at all by the legislature, but are issued to supplement already existing statutes, and to fill up the places in such statutes which have not been regulated in detail by them, or to make arrangements for their execution. The power to issue this class of ordinances is found only in monarchical governments or in republics where monarchical traditions are strong.

Delegated ordinances are issued by any of the administrative authorities indiscriminately, not as a result of any constitutional power of ordinance in the chief executive, but as a result of a direct delegation by the legislature of its power of legislation. These delegated ordinances, like the supplementary ordinances, affect those subjects which have been already regulated in a general way by the legislature, but all of whose details have not been thus fixed. These ordinances we find in all states and in all branches of the administration. They are really the most important of all the ordinances to be considered, and are by far the most numerous.

III.—Executive functions of the judicial authorities.

Although the general rule may be that the courts shall be confined in the main to the decision of controversies between individuals, nevertheless in many instances the needs of government make it seem advisable to entrust the courts with functions somewhat administrative in character. While this may be said of all states, it is especially true of those which have not really striven in their law to reach any clear distinction between judicial and administrative functions.

Thus in the commonwealths of the United States and England where the exceptions to the logical adoption and application of the theory of the separation of powers are numerous, judicial officers from time immemorial have been entrusted with the discharge of executive or administrative functions.[1]

We in the United States are indebted for this confusion to England, which for a long time did not attempt to separate the judicial and administrative authorities. The justices of the peace have been at the same time judicial and highly important administrative officers. As almost all our important local administrative officers originated in the justices of the peace, they have been regarded by the courts as inferior statutory tribunals, subject to the never ceasing interference of the courts; and this fact has led to the failure in many cases to distinguish at all in our law and political thought between judicial and administrative functions and to there being no opposition to the actual conferring of functions upon the courts which would seem to be administrative in nature. A most noticeable instance of this is found in the power given to the supreme court in New York to approve the acts and determinations of various administrative commissions such as the rapid-transit commission, such acts being of no effect until they have been so approved.[2]

[1] In certain cases this has been held to be unconstitutional, *supra*, p. 24.

[2] *E. g.* see New York laws, 1875, chap. 606, section 21; New York Constitution, art. iii., section 18.

CHAPTER V.

THE RELATION OF THE EXECUTIVE TO THE OTHER AUTHORITIES.

The principle of the separation of powers not only involves the existence of three somewhat separate authorities, but also insists that each authority shall be independent of the other authorities. But just as it is impossible to distinguish clearly three powers and authorities of government, so is it impossible that any of the three authorities shall be absolutely independent of the other two. As administrative law has to do with the position of the executive it is necessary to examine its relations with the other two authorities.

I.—Relation to the legislature.

1. *The legislature the regulator of the administration.*—In all countries the action of the executive is subject to the control of the legislature. In the first place the legislature has the power to lay down norms in accordance with which the executive is to act. The legislature has been called the regulator of the administration.[1] This does not mean, however, that the executive can act only in the execution of the resolutions of the legislature, and that it possesses no discretion. Even in the United States, where the power of the legislature to regulate the

[1] Sarwey, *op. cit.*, 37; Gneist, *Der Rechtsstaat*, 181.

action of the administration has been carried as far as anywhere, it is held that there is a sphere in which the administration may move without looking to a statute of the legislature for its authorization. Thus Justice McLean says in an opinion given in the United States Supreme Court.[1]

A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to use his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits.[2]

Further, it is generally recognized in the United States that there is in the executive authority a latent power of discretionary action which is denominated the war power, and which is, in times of extraordinary danger, capable of great expansion. This was brought out most forcibly in the critical period of our civil war.[3] The same general principle is true in all states.[4]

[1] U. S. v. McDaniel, 7 Peters, i., 14.

[2] See also *In re* Neagle, 135 U. S., i., 64–68, which claims somewhat similar powers for the President as a result of his duty to see that the laws are faithfully executed. *Infra*, p. 64.

[3] *Cf.* W. A. Dunning on "The Constitution in Civil War," in the *Pol. Sci. Qu.*, III., 454.

[4] *Cf.* Sarwey, *op. cit.*, 37.

It is seen thus that while the main duty of the executive is to execute the will of the legislature as expressed in statute, still in all countries there is a realm of action in which the executive authority possesses large discretion, and that it looks for its authority not to the legislature but to the constitution.

2. *The control of the legislature.*—Further, besides regulating the action of the administration, the legislature exercises in all countries a direct control over the administration to keep it within the law. The extent of such control varies with the relation in tenure of the executive to the legislature. If, as in England and France, the acting executive is dependent in tenure upon the legislature, the extent of this control will depend entirely upon the attitude which the legislature takes. If, as in France, the legislature makes an immoderate use of its powers of control, the executive authority becomes completely dependent in action upon the legislature; if, as in England, the legislature imposes bounds upon its control over the executive, beyond which it will not go, the executive, though in theory completely dependent in action upon the legislature, still in practice will be largely independent of it. The existence of the power of control will have simply the effect of deterring the administration from illegal action. In the United States and Germany the executive is not dependent upon the legislature in tenure; in Germany, not at all; in the United States, only in such a way that it may be removed in case of absolute corruption and illegal action. The result is that the control of the legislature over the actions of the administration in these countries is very slight.[1]

[1] See *infra*, II., p. 262.

II.—Relation to the courts.

In all countries the executive authorities are subject also, to some extent, to the control of the courts. In all states many of the acts of the administration may be reviewed by the courts. The extent and character of the control which the courts may exercise over the administration, depend upon the character of the act to be controlled. From the point of view of this control the acts of the administration may be classed under four heads, *viz.*, political acts, legislative acts, acts in the nature of contracts, and special administrative acts not of general application.

1. *Political acts.*—By political acts are meant those acts whether of general or of special application done by the administration in the discharge of its political functions, such as the carrying on of the diplomatic relations of the country, the making of treaties, the command and disposition of the military forces of the government, the conduct of the relations of the executive with the legislature. The general rule in all countries is that the courts have no control over this class of acts. Where the principle of ministerial responsibility to the legislature has been adopted it is believed that this will be sufficient to insure the impartial and wise performance of these political acts. Where the principle of popular responsibility has been adopted it is believed that this will be sufficient, and that it is unwise to allow the courts any control whatever over the political functions of the executive.[1]

[1] *E. g.* see Nabob of Carnatic v. East India Co., 1 Vesey Jr., 375, 393, 2 *Id.*, 56, 60; Penn. v. Lord Baltimore, 1 Vesey, 467; Cherokee Nation v. Georgia, 5 Peters, 1, 20; Luther v. Borden, 7 Howard U. S., 1; and Mississippi v. Johnson, 4 Wallace, 475.

In France, where the executive is more independent of the courts than in any other country,[1] a much wider interpretation has been given to political acts than is given in other countries. The courts have gone so far as to hold that acts of a very arbitrary character and restrictive of private rights, which were taken to promote the public safety in time of public excitement, were of a political character.[2]

2. *Legislative acts.*—The legislative acts of the administration are to be found in the ordinances which it has the power to issue. The rule as to the control which the courts may exercise over them is in all countries about the same. The courts have the same power over them as the courts of the United States have over the statutes of the legislature, *i. e.* they may interpret them and in most cases declare them void or refuse to enforce them in case they are contrary to the law.[3]

3. *Contractual acts.*—The general tendency at the present time as to the control which the courts possess over the contractual acts of the administration is to admit a pretty full control. England and the United States are the most backward in this respect.[4]

4. *Administrative acts of special application.*—The fourth class of acts distinguished are special administrative acts not of general application. In the United States they are called indiscriminately orders, decisions,

[1] See *Code Pénal*, art. 137.

[2] Thus the administrative authorities have, in order to prevent the publication of a journal which, it was claimed, was exciting the passions of the people, wrecked its office, and the courts have held that this was a political act, and not subject to review. *Arrêt du Conseil d'État*, 5 Jan., 1855, *affaire Boule*; cited in Ducrocq, *Traité du Droit, Administratif*, I., section 64; *cf.* Aucoc, *Conférences sur l'administration, etc.*, 441, *et seq.*

[3] *Infra*, p. 74.

[4] See *infra*, II. p. 149.

precepts, and warrants. By the performance of these acts the administrative authorities perform a large part of their duties, and in their performance they are coming into continual conflict with the individuals whom they govern. Some sort of a control over these acts is extremely necessary; and in the kind and extent of the control provided in different states we find greater differences than exist in the case of the control provided for the three other classes of acts. The four countries whose law is being considered may, from the point of view of the control possessed by the courts over this class of acts, be divided into two classes. In the first are found England and the United States. The rule in these countries is, that when an individual act of the administration is not of a political or a contractual character the courts have a very large control over it. In many cases they may annul it, amend it, interpret it, and prevent the administration from proceeding to execute it.[1] In the second class of countries, in which are to be found France and Germany, the rule is completely different. The French principle of the independence of the administration prevents the courts from exercising any sort of a control over such acts. This principle has been adopted in Germany. But in both countries in order to render justice to the individual there have been established, for the review and control of certain of these special administrative acts, special tribunals known as administrative courts, organized quite differently from the ordinary courts and not forming part of the regular judicial system.[2]

[1] *Infra*, II., p. 200.

[2] For the development of this subject in detail, see *infra*, II., pp. 217, 240.

III.—The position of the executive.

It is now possible, after this consideration of the relations of the executive authority, with the legislature and the courts, to see what is the position of the executive authority. In the United States the executive authority is almost entirely independent of the legislature, but its acts not of a political or contractual character are subject in many cases to the control of the courts which are to keep the executive within the limits of the law. In France the executive authority is subject to the control of the legislature as a result of the adoption of the principle of ministerial responsibility to the legislature. Its relation to the courts is one of almost absolute independence. In Germany the executive authority is independent of the legislature, and to a large extent also of the courts. In England the executive authority is subject to the control of both the legislature and the courts. Its only acts which are independent of the courts are its political acts, and certain of its contractual acts.

The result is that the executive authority is, from the administrative point of view, the strongest in Germany and France. In France this strength is somewhat weakened over against the legislature by the existence of the parliamentary responsibility of the important executive organs, but is very great over against the courts. Therefore, on the continent of Europe, administration, the function of the executive authority, will be found to be more important than in the other countries; and it is on this account that the study of this function of administration is pursued there with greater interest than in either the United States or England.

CHAPTER VI.

TERRITORIAL DISTRIBUTION OF ADMINISTRATIVE FUNCTIONS.

I.—Participation of the localities in administration.

The ends of the state which it is the duty of the government to realize may be called public ends in distinction from the ends of individuals. The term public ends does not, however, indicate simply those ends which are to be realized through the instrumentality of the central government. For, though the state is an indivisible union of persons within a given territory, still the people forming the state are, in all countries of any size, organized in a number of local communities which have been called into being through the simple fact that the people living within a defined district have common needs which are peculiar to themselves. If the ends which such people follow in their local organizations are recognized by the state as reaching beyond the interests of the individual then such ends become public ends, just as much as the ends which the state attempts to have realized through the central governmental organization. For the mere fact that such ends may be regarded by the state as public ends does not make it necessary that the government shall act solely or mainly in the attainment of these ends through its central organization. The

state everywhere grants, directly or indirectly, to the localities powers to act in the attainment of this class of public ends and provides that its central governmental organization shall step in simply to assist and control the localities. In other words central and local government work together in the attainment of the ends of the state. The state may not, it is true, recognize that there is any actual sphere of local government at all in the sense that the localities have by the constitution powers, with the exercise of which the central government may not interfere. The localities may be left largely at the mercy of the central government. This is very largely true of all countries, though in the United States the largest of the localities, *viz.*, the commonwealths, are protected by the United States constitution against the central government, and there is arising the belief that the divisions of the commonwealths should in like manner be protected by the commonwealth constitutions against the commonwealth governments.[1] In many countries also, notwithstanding the absence of constitutional provisions assuring to the localities a sphere of local government, the people have become so convinced of the necessity of the existence of a degree of local autonomy that the legislature has provided that within certain limits the localities shall act as they see fit, in the pursuit of local public ends. As to what shall be the sphere of local autonomy, whether it be fixed by the constitution or by legislation, it is impossible to lay down many general principles of universal application. It may, however, be said that the localities in a state may not with due regard to the unity of the state be

[1] Burgess, "The American Commonwealth," *Pol. Sci. Qu.*, I., 32.

permitted to exercise powers of legislation with regard to private relations. Of the four important countries only one has seen fit to grant by its constitution to the localities such a legislative power. This is the United States, and the evils resulting from the consequent diversity of the private law are so great that in more than one instance the demand is being made either for national regulation of private relations or for the devising of some method by which the law may be made uniform.[1]

In the second place it may be said also that, for the same reasons, the localities should possess no powers with regard to the administration of justice, that the judicial system should not be subject to local regulation. Here again the United States is the only one of the four countries which permits its localities to organize courts that are to decide the controversies arising among its citizens relative to their private rights. When, however, we come to the function of administration the demand for harmony and uniformity is not so imperious. Even in France, the home of centralized government, it is recognized that, while the country can be governed from the centre better than from the localities, it can be administered better in the localities than from the centre. But while this principle may be accepted as generally true, it must also be admitted that there are certain branches of administration in which the localities can in the nature of things not act at all. Thus the localities can have no duties to perform in the administration of foreign relations.

[1] See Munroe Smith on "State Statute and Common Law" in *Pol. Sci. Qu.*, III., 147, 148. The recent appointment by the various commonwealth legislatures of commissioners for harmonizing the law in important matters is an evidence of the evils of diversity.

Further, in certain other administrative branches, the demand for uniformity in administrative methods is so imperious, that if the localities are permitted to act at all within them, they must act subject to the control of the central government. This is true of the administration of military, judicial, and financial affairs. In these branches the localities cannot be permitted to have any powers of independent action, but must be regarded as agents of the central government and subject to its control. The result of this process of exclusion is that the sphere of local administrative autonomy, if recognized at all, is to be found in that branch of administration known as internal affairs. Even in this branch, as in the others just mentioned, in many cases the localities must, on account of the necessity of administrative uniformity, be subjected to the control of the central government. Thus the administration of the public health and the public charity and the preservation of the peace cannot be left altogether to the localities independent of all central control. What shall be the spheres of central and local administrative action in a given state, and what shall be the kind and extent of central control exercised over the localities where they are regarded as the agents of the central government, are matters to be determined by the positive law of the particular state; and the determinations reached by different states differ considerably one from the other, and are based upon the differing social and political conditions obtaining therein.[1]

II.—English method.

Two general methods of providing for the participation of the localities in the work of administration

[1] *Cf.* Stengel, *Organisation der Preussischen Verwaltung*, 11 *et seq.*

have been adopted. By the one all the duties to be performed by the localities, both as agents of the central government and as local governmental organizations, are fixed in detail by the legislature of the central government.[1] Where this system of enumeration by the legislature of the powers of the localities is adopted, as is the case in England and the United States, no sphere of independent local action is assigned to the localities. They may, it is true, be regarded as local corporations with the power of owning property and of suing and being sued, but they have no sphere of action of their own. They are regarded simply as districts of the central government of the state or commonwealth, and their officers are simply agents of that central government acting in the local divisions. This is the case in the smaller localities of the United States. This idea is well brought out in the case of *Hamilton Co. v. Mighels*,[2] where the court says that the county is merely a division for the purposes of general commonwealth administration, and in the case of *Lorillard v. The Town of Monroe*,[3] where it is held that "town officers," such as assessors, collectors, etc., are public commonwealth officers, and not officers of the town corporation for whose action the town is responsible. Full municipal corporations are, from this point of view in about the same position as these *quasi* corporations, as the towns and counties are called.

[1] In case the legislative power as to administrative matters is, as in Germany and in the United States, given to the largest divisions of the state, *viz.*, the commonwealths; the legislatures of these divisions have the power to arrange the administrative system as they see fit within the boundaries of the commonwealth.

[2] 7 Ohio St., 109.

[3] 11 N. Y., 392.

Their powers are all enumerated, and it cannot be said that they have by the constitutions or the statutes many powers of independent local action.[2] Under such a system of legislative enumeration the needs of uniform administration are, it is thought, satisfied by the exercise by the legislature of its power to change the duties and increase or decrease the powers of the localities. The continual interference of the legislature resulting from the exercise of this power has had such evil results in the United States that the attempt has in many cases been made to limit in the commonwealth constitution the power of special and local legislation possessed by the legislature. But as the general acts with regard to local administration usually follow the same method of enumerating in detail the powers and duties of the local authorities, they have in some cases, on account of the rigidity and inflexibility of their provisions and of their inadaptability to local needs, proved almost as unsatisfactory as the habit of special and local legislation. This method of regarding the localities as in all cases the agents of the central government, and of enumerating in detail their duties and powers, makes unnecessary any further central control over the administration in the localities. The control over localities and over local officers is by this system a legislative control.

III.—Continental method.

The other method of permitting localities to participate in the work of administration depends upon clearly distinguishing between that administrative work which

[2] See U. S. v. B. & O. R.R. Co., 17 Wall., 322; *cf.* Dillon, *Municipal Corporations*, 4th edition, I., 145.

needs central regulation and that which can with advantage be entrusted to the localities. The delimitation of a sphere of local action is accomplished by the determination of those matters which need for their efficient treatment uniformity in administrative action, and which should therefore be attended to by the central administration. What is left after the subtraction of these matters from the whole sphere of administration constitutes the sphere of local administrative action. The regulation of the matters falling within this sphere of local action is then given by general grant to the local corporations and their officers. By this method the local corporations are not authorities of enumerated powers but may exercise any power which has not been expressly denied to them, or has not been expressly given to the central administration. This is the method very generally adopted on the continent of Europe.[1] Now if the localities were permitted to determine in concrete cases their competence there would be danger of disintegration through their attempts to usurp functions not recognized as local. Therefore, where such a system of distributing administrative powers has been adopted, the power is given to the central administrative authorities to step in and prevent the local corporations or authorities from making such usurpation. Further, as all administration demands pecuniary resources and as the exercise of the taxing power by the localities may result in the disorganization of the general financial system of the state, the central legislature usually fixes what kinds of taxes the localities may raise, and permits the central administrative officers to exercise a general control over the

[1] *Infra*, p. 266.

administration of the local finances in order that in this way extravagance may be prevented. Finally, while it may be recognized that the local corporations have a sphere of action of their own in which they act subject to the central administrative control, at the same time the central government may under this system recognize that the localities are also in certain branches agents of the central government. So far as this is the case the localities must be subjected to some sort of central control; and this control is usually as in the other cases an administrative control.

IV.—Sphere of central administration.

But, as has been indicated, there are certain branches of administration where, in the nature of things, the localities cannot act at all or cannot act to the same advantage as the central administration. For these branches the central government forms a series of officers unconnected in any way with the local corporations. The tendency in the United States has of late years been to increase the number of such administrative services attended to by the central government. Thus the customs and the indirect taxes, formerly often attended to by local officers,[1] are now entrusted to officers of the central government.[2] In the commonwealths all such matters as factory inspection, railroad supervision, the control of pauper lunatics in some cases, and

[1] *Cf. The History of Tariff Administration in the United States*, by John D. Goss in the series of *Studies in History, Economics, and Public Law*, edited by the University Faculty of Political Science of Columbia College, I., No. 2, pp. 12, 15.

[2] In Germany customs and indirect taxes are attended to by the commonwealths under the supervision of the imperial government. Imperial Constitution, arts. 35 and 38; *cf.* Meyer, *Lehrbuch des Deutschen Verwaltungsrecht*, II., 310 *et seq*; 335.

a whole series of matters are attended to by commonwealth officials unconnected in any way with the local corporations. In all countries these central officers, if we may so call them, are subject to quite a strict central administrative control.

As a result of these arrangements which we find in all countries, the details offering considerable variety, we conclude that not only is the function of administration largely separated from the functions of legislation and the rendering of judicial decision, and entrusted in most cases to special authorities, but also that these special administrative authorities are in all states of two kinds, *viz.*, central and local, while in some states the local authorities may further be subdivided into commonwealth and local authorities. As the law in the United States distributes what are usually regarded in a unified government as central powers between the national and the commonwealth governments, this order will be so changed in the following pages as to consider as central authorities both federal and commonwealth authorities, and as local only those subordinate commonwealth authorities having a territorial competence within the limits of a commonwealth.

Of these two classes of authorities the central authorities have to attend to those matters which by the law of the land have been recognized as general in character, and where the central control over the localities is an administrative one, have to exercise that control. The local authorities on the other hand act as agents of the central government, and are local corporations with, in some states, their own sphere of

independent local action; and in all cases are subject to a central control which in accordance with the method of distributing administrative duties among the localities is either a legislative or an administrative control.

BOOK II.

CENTRAL ADMINISTRATION.

Division 1.—The Executive Power and the Chief Executive Authority.

CHAPTER I.

THE EXECUTIVE POWER AND THE EXECUTIVE AUTHORITY IN GENERAL.

The organization of a chief executive authority, and the definition of the executive power which should be entrusted to it, are problems which have always been difficult of solution for both political scientists and constitution makers. The first difficulty which presents itself is the organization of the chief executive authority. Shall it be a board or one man? A board ensures deliberation, and by many has been supposed to be a preventive of executive tyranny; the one-headed form is more liable to produce quick and energetic action. The desire to produce this result has in almost all cases been so great that the one-headed form of the executive authority is now almost universally recognized as the proper form. The next great difficulty has been found in the determination of the

extent and character of the power which shall be entrusted to the chief executive authority. Both practical men and students have always had great difficulty in obtaining a clear conception and an adequate expression in their governmental organization of their conception of the power to be given to their chief executive authority. The cause of this difficulty is twofold. The first cause of difficulty has come from the theory of the separation of powers. This theory insists that the executive authority should both have in his hands all of what is regarded as the executive power and be confined to the exercise of the executive power. The experience of the world, however, goes to prove that, if such an attempt is made, the executive authority tends to become either tyrannical or incapable: tyrannical, if it have the entire executive power; incapable, if it have no other than the executive power. Men have therefore been compelled to abandon the realm of theory and to allow themselves to be governed in their determination of the power to be given to the executive authority by the history and needs of the country for which they were forming a constitution, with the natural result that the conceptions of the character and extent of the executive power which the constitutions of existing states present are quite different the one from the other.

The second cause of the difficulty of determining what shall be the power entrusted to the chief executive authority is to be found in the failure, which is so often made, to recognize that what is called the executive power really consists of two functions. These are the political or "governmental" function, as the French call it, and the administrative function. These two

functions it is somewhat difficult to distinguish, but the distinction does exist, and is capable of perception. A noted French writer on administration has, as clearly as any one, brought out this distinction, which is more pronounced in France than elsewhere, and has an important influence on the French law. This is M. Aucoc, who says[1]:

> When we distinguish government from administration we mean to put into a special category the direction of all affairs which are regarded as political, that is to say the relations of the chief executive authority with the great powers of the government: the summoning of electors for the election of senators and representatives, the closing of the session, the convocation of the chamber of deputies and of the senate, the closing of their session, the dissolution of the chamber of deputies; the carrying on of diplomatic relations with foreign powers, the disposition of the military forces, the exercise of the right of pardon, the granting of titles of nobility.

He adds:

> The administrative authority has a mission altogether different. It is charged with providing for the collective needs of the citizens which the initiative of individuals or associations of individuals could not adequately satisfy; it must gather together the resources of society both in men and money in order that society may continue to exist and make progress; it must play the part of the man of business of society, in its management of the various public services, as for example in the matter of public works; it must take measures of supervision and must through the exercise of foresight preserve the property destined for the use of the public, must maintain order and further the general prosperity.

Some constitution makers and political scientists have regarded the executive power as composed of only the first of these powers; others, while recognizing

[1] *Conférences sur l'Administration, etc.*, I., 78.

the existence of both, have laid such emphasis on the political side of the executive power as almost to ignore the necessity of the possession by the chief executive authority of any administrative power; while, finally, others have seen that an efficient executive must be an administrator as well as a statesman. The different ideas that men have had of the part of the executive power which should be given the greatest prominence have thus led to great differences in the determination of the power to be given to the chief executive authority. In some governments we find the executive authority is simply a political chief.[1] This is the position which has been assigned to the executive authority in the commonwealths in the United States. In other governments the political power has been brought largely under the control of the legislature. The position of the chief executive as an administrator is much more important than his position as a political authority. This is very largely true of France and to a certain extent of England. Finally, in other governments the chief executive authority has been recognized as both a political authority and chief of the administration. This is the case in the United States national government and in Germany. In those states which recognize the chief executive as merely a political officer, the administrative power is given to another series of officers quite distinct from the chief executive authority and very largely independent of him,[2] and in many instances is exercised by judicial bodies.

[1] Even as a political chief the powers of the executive authority will vary greatly. In some it will thus have the veto power, in others not; in some it will have a large power of ordinance, in others, almost none at all except such as is delegated to it by the legislature which may be very chary of its delegations.

[2] *Infra*, p. 136.

CHAPTER II.

HISTORY OF THE EXECUTIVE AUTHORITY AND POWER IN THE UNITED STATES.

The office of chief executive was naturally the most difficult to organize in the United States government. The form of the office gave the framers of the national constitution little trouble. They were substantially agreed upon the one-headed form though the board form was considered.[1] In their decision as to the powers to give to their executive chief they were, even more than in their decision as to the form of the office, guided by the models with which they were acquainted. These models were the office of colonial governor and the English King as they understood his position.[2] It has often been said that they modelled their President on the English King, but careful consideration would seem to show that the influence of English institutions was less strong than is usually believed, and that the framers of the national constitution introduced into their new government the American governor rather than the English King.[3] What now were the powers of the

[1] Elliot's *Debates*, Philadelphia, 1876, v. *passim*; Rüttiman, *Das Nord-Amerikanische Bundesstaatsrecht*, I., 232; see also J. H. Robinson on "Original Features in the United States Constitution," in *Annals of American Academy of Political and Social Science*, I., 222.

[2] Elliot's *Debates*, *loc. cit.*; *Annals*, *etc.*, *loc. cit.*

[3] The author is glad to see that the result of his own study is corroborated by Prof. James Bryce, *American Commonwealth*, I., 36.

commonwealth governors at the time the national constitution was framed? This question may be answered by a study of the position of the governor in the three most important commonwealths of the time, *viz.*, New York, Massachusetts, and Virginia.

I.—The executive power in New York at the time of the framing of the national constitution.

By the first two charters or patents relating to the territory embracing what is now the commonwealth of New York the entire governmental power was given to the Duke of York. This power he transferred to a governor whom he appointed.[1] In 1685, James, Duke of York, became King of England. The character of the colony changed. It had been proprietary; it now became provincial. The character of its institutions remained, however, the same. The commission and instructions issued to the governor, in which his powers are to be found since New York was not a charter colony, still gave to the governor under the King the entire governmental power and limited the exercise of that power only by requiring for the validity of certain of his acts the consent of a council whose members were chosen by the King.[2] After the great revolution of 1688, another limitation was placed upon the exercise of the powers of the governor, in that provision was made in the commission and instructions for the summoning of a popular assembly whose consent was to be necessary for all laws and ordinances.[3] The

[1] Poore's *Charters and Constitutions*, I., 785, 786; *Documents Relating to the Colonial History of New York*, III., 215 *et seq.*, 331.

[2] Documents, *etc.*, III., 377.

[3] An assembly was summoned in 1683, but it had little influence.

governor had the power to adjourn, prorogue, and dissolve this assembly. His other powers enumerated in the commission and instructions were to appoint all officers necessary for the administration of justice and the execution of the laws; with the consent of the council and in accordance with royal order, to organize courts of justice and with the council to act as the court of appeals in civil cases. The governor had also the pardoning power and an extensive military power.[1] Such was the legal position of the governor. The assembly in course of time, however, began to encroach on the power of the governor, and practically introduced important modifications into the governmental system. We find the letters of the governors to the English Board of Trade, which had a supervision over the affairs of the colonies, full of complaints of the refractory character of the assemblies.[2]

The points on which the colonists laid the greatest stress in their struggles with the governors were, as might be supposed, first, the control of the finances,

[1] Documents, *etc.*, II., 623 and 685.

[2] See Documents, *etc.*, VI., 456, 460, 472, 533, 543, 550, 554, 597, 752, and 764. In one of these letters the governor says: "By his majesty's commission as well as instructions to his governors of this province all publick money is to be issued by warrant from the governor with the advice and consent of the council. By every act granting money to the king for several years past great part of the money is issued without such warrant and sometimes by warrant of the speaker of the assembly only."

In another letter dated March 19, 1749, and written to the Duke of Bedford, the governor says: "I must beg further to observe to your Grace that the first encroachments on the royal prerogative began under the administration of Mr. Hunter, that the assembly took advantage of the necessities the administration was then under (by the war with France and an expedition then set on foot in America against Canada), to claim a right of appointing their own treasurer and refused to support the government unless this was yielded to them."

He then adds that Mr. Hunter struggled against them for four years and was then forced to yield. *Cf.* Gitterman, "The Council of Appointment in New York," *Pol. Sci. Qu.*, VII., 80.

and, second the right of appointing officers as being the most important powers which the governors possessed. After the wasteful administration of Lord Cornbury they insisted on specifying the purposes for which the money which they granted should be spent, and, after they had secured the recognition of this power, during the administration of Governor Clinton they made use of this power of appropriation to grant their salaries to the officers of the government by name, thus assuming to themselves a large portion of the appointing power. The result of the constitutional development during the colonial period in New York was that the legislature had at the time when New York became independent almost absolute control over the finances, granting the money, making the appropriations, and controlling the officer on whose warrant it was issued, and participated quite largely in the exercise of the appointing power. When New York became independent it was only natural that the framers of the new constitution which was adopted should incorporate into their new instrument of government the principles for whose recognition they had for so long a time been struggling with the colonial governors; and we find that the constitution of 1777 differed from the previously existing polity of New York only in that these principles were now given the sanction of written law and in that the whole political system was somewhat leavened by the prevailing political philosophy, especially by the two principles of popular sovereignty and the separation of powers. Thus by the new constitution the finances for whose control the people had been struggling were put into the hands of the legislature. Taxes could be levied and money appropriated

only by the legislature.[1] The treasurer on whose warrant all money was to be issued was to be elected by the legislature by an act to originate in the assembly.[2] The governor's power of appointment, which had also been a point at issue in former times, was subjected to a legislative control in that the consent of a council of appointment, to be composed of members of the legislature and elected by the legislature, was made necessary for the valid appointment of all officers appointed by the governor.[3] The principle of the separation of powers made itself felt in that the new constitution attempted to define the so-called different powers of government,[4] and allowed the governor almost no control over legislation[5] and absolutely none over the rendering of justice. This resulted from the failure to enumerate among his powers any judicial powers other than the power of pardon[6] and the express formation of a system of courts which were to decide all controversies. The principle of popular sovereignty made itself felt in that the governor was to be elected by the people and was reduced to the position of an officer who was simply to execute the laws with little discretion.[7] There could no longer be any authority to issue instructions to him since the power of the English King was no longer recognized.

II.—The executive power in Massachusetts.

The history of the province of Massachusetts begins with the year 1691. The provincial charter which

[1] Art. ix. The system was thus in this respect the same as in the colonial period.

[2] Art. xxii. [3] Art. xxiii. [4] Arts. ii., xvii., xxxii.

[5] Art. iii. [6] Art. xviii. [7] *Cf.* Art. i.

was then given to the colony united the two formerly existing colonies of Massachusetts Bay and Plymouth.[1] This charter formed by the side of the governor a legislative body, the General Court, which consisted of the governor's council, chosen by the General Court, and of representatives chosen by the freeholders of the colony. The governor had the power to adjourn, prorogue, and dissolve the General Court; could, with the consent of the council, appoint a great many officers, mostly local in character, though the general appointing power, where there was no special provision in the charter, belonged to the General Court; had a veto power over all the acts of the General Court; had very limited judicial powers—only the probate of wills and the granting of administrations; and finally had extensive military powers, some of which could be exercised only with the consent of the council.

It will be noticed from this enumeration that the legislature had under the charter of 1691 almost all the powers which the New York assembly tried for so long a time to get. It had the general appointing power, and through this a large control over the finances, since it could appoint its own treasurer. We find therefore that the Massachusetts legislature did not encroach seriously upon the powers of the governor; and that on the adoption of a constitution in 1780 no very great changes were made in the form of the government. Of course the substitution of the doctrine of popular sovereignty for that of royal sovereignty, as well as the adoption of the principle of the separation of powers which was very forcibly announced,[2] made some changes, but these are about all. Thus the

[1] Poore, *op. cit.*, I., 949.

[2] See Const., Art. xxx., part i.

constitution of the new commonwealth provided that the governor was to be elected by the people. The governor lost his control over the legislature; his veto power was limited and his judicial powers disappeared. His military powers were about the same as before, and as before he could appoint most of the judicial and local officers, but all the important central officers of the commonwealth were to be appointed by the General Court.

III.—The executive power in Virginia.

Virginia, like New York, had no colonial charter. Recourse must therefore be had to the commission and instructions issued to the governor to find what was the extent of the executive power. In Beverly's *History of Virginia*, published about the year 1705, is found a tolerably complete description of the civil polity of the colony based on this commission.[1] We find a governor appointed by the King and subject to his instructions, with the power to adjourn, prorogue, and dissolve the assembly and to veto all their acts. The governor's power of appointment extended, as a rule, only to the local officers; he had large military powers, but the appointment of the most important officers of the colonial financial administration belonged to the assembly whose speaker acted as treasurer.[2]

It will be noticed that, as in Massachusetts, the legislature had as early as 1705 what the assembly in New York struggled so long to get, *viz.*, the control of the finances. Therefore we find few attempts on the part of the legislature to encroach upon the powers of

[1] Book iv., part i.

[2] Campbell, *History of Virginia*, 535 *et seq.*

the governor; and that when the colonists came to form their commonwealth government at the time of the declaration of independence they did not find it necessary to make many changes beyond those which the prevalent political philosophy made it probable they would adopt.

Thus the principle of the sovereignty of the people is seen in the fact that the governor was to be elected by the people's representatives, the legislature. In accordance with the principle of the separation of powers he lost his control over the legislature, by the abolition of the power of dissolution and prorogation and the veto power. He had still the same appointing power as before—that is, for local officers,—but subject to the consent of the council. He had also to exercise with the advice of the same body the military power and the power of pardon. The important central officers, including the treasurer, were to be appointed by the legislature.

IV.—The American conception of the executive power in 1787.

The American conception of the executive power prevailing at the time of the adoption of the commonwealth and national constitutions, as evidenced by the examples which have been adduced, corresponded with that part of the executive power which has been called the political or governmental power. The great exception to this was that the carrying on of foreign relations was not included in the governor's powers. This does not, however, prove that this power was not considered a part of the executive power. The omission of this power was due entirely to the peculiar

position of the colonies, and later of the commonwealths. The care of the foreign relations was not in the governor's hands simply because, during the colonial period, the mother country, and during the existence of the commonwealths as separate states the continental congress had attended to this matter.

To a similar reason is due the fact that the governor did not have very extensive administrative powers. Administrative matters, outside of those connected with the military powers of the governor, had not been attended to by the central colonial government, but, in accordance with the English principles of local government, by officers in the various localities, and mainly judicial in character. Thus in the case of the administrative matters connected with justice, almost the only matters attended to by the governor were embraced in the powers of appointment and removal. The everyday matters of court administration were attended to either by the courts themselves, or by the officers in the localities in which the courts had jurisdiction. The facts were the same in the branch of the administration known as internal affairs. Here the central colonial government had little to do except to appoint certain of the officers, the justices of the peace and sheriffs, who, after their appointment, attended to those matters in their own discretion. Further, this branch of administration was a very small one, embracing practically only such matters as the preservation of the peace, the care of the poor and of highways and local finances. There was thus left only one branch of administration in which the central colonial government had any powers to exercise. This was the administration of the central finances; and here, on

account of the importance of this branch of administration, we find that in all the three colonies the question was definitely settled before the revolution that the legislature should exercise a very important control over the finances, if it did not take them into its absolute administration. It claimed, and obtained the power to vote all the supplies that the government could obtain, to specify in its appropriation acts for what purposes the money it had raised should be expended, and to designate the officer who was to have charge of its collection and disbursement. The power of appointment, which is an administrative power that is to be found in all the branches of administration, was treated differently in different commonwealths, but the conception that it belonged to the governor in the case of other than judicial and local officers was not very clear. In New York alone it can be said that the general power of appointment was regarded as one of the governor's powers, and even here it was subjected to a legislative control. One fact further deserves mention. That is, that the governor possessed neither in the colony nor in the commonwealth any general ordinance power, even to supplement existing law. As Roger Sherman said: "The executive is not to execute his own will, but the will of the legislature declared by laws."[1]

The only purely administrative branch attended to by the central colonial and commonwealth government was, then, the financial administration, which was almost entirely attended to by the legislature. This formed the model which the framers of the new national government tried to copy when they came to

[1] Quoted in Conkling's *Executive Power*, 1882, pp. 62 *et seq.*

build up a great administrative system, but which their successors were forced by circumstances to abandon.

V.—The history of the executive power in the early national government.

1. *Original position of the President.*—The national constitution provided for a President, in whom the executive power should be vested.[1] What the meaning of those words was in 1787 has just been shown. It was that the President was to have a military and political power rather than an administrative power. The meaning of these words is further explained by the enumeration of the specific powers which were granted to the President by the constitution. These are the same powers possessed by the governors of the commonwealths. They are the power of military command, the diplomatic power, the limited veto power, the power of pardon, the power to call an extra session of Congress, to adjourn it in case of a disagreement between the houses, and the power to send a message to the Congress. The general grant of the executive power to the President means little except that the President was to be the authority in the government that was to exercise the powers afterwards enumerated as his. The only other enumerated power is an administrative power, and is also the only purely administrative power that is mentioned clearly in the constitution. This is the power of appointment.[2]

[1] Art. ii., section 1.

[2] Art. ii., sec. 2, par. 2, provides that "the President shall nominate, and by and with the advice and consent of the senate shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of

Finally it is to be noted that, in accordance with the American conception of the executive power, the President did not have any power to issue general ordinances, even to supplement existing law, which would bind the citizen. The only ordinance power which the President had at the beginning of our history, and indeed has now, is the power to issue ordinances when the legislature has specifically delegated to him the power to regulate a given subject. The only possible exception to this rule is that in times of war the war power which is generally recognized as belonging to the President is susceptible of very great extension and may be construed, indeed in the past has been construed, as giving to the President quite an ordinance power.[1]

It will be seen from this enumeration of the powers given to the President by the national constitution that the conception of the executive power held by the framers of the national constitution was the same as that to be found expressed in the constitutions of the three commonwealths whose constitutional history has been examined. The President had the political power and one administrative power, *viz.*, the power of appointment. Beyond the power of appointment he had, so far as the express provisions of the consti-

the United States whose appointments are not otherwise provided for, and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they may think proper in the President alone, in the courts of law, or in the heads of departments." Paragraph 3 adds: "The President shall have power to fill all vacancies that may happen during the recess of the senate by granting commissions which shall expire at the end of their next session." Further, section 3 gives to the President the power of commissioning all the officers of the United States.

[1] See *supra*, p. 32; and Fisher, "Suspension of Habeas Corpus" in *Pol. Sci. Qu.*, III., 163.

tution were concerned, no control over the administration at all.

2. *Change due to the power of removal.*—But American development has completely changed this conception of the power possessed by the President. In the first place the duty imposed upon him by the constitution, to see that the laws be faithfully executed,[1] has been construed by the Congress as giving it the power of imposing duties and conferring powers upon the President by statute, and has led to the passage of almost innumerable laws which have greatly increased the importance of the President's position, and have given him powers and duties relative to the details of many administrative branches of the national government.[2] In the case of *In re Neagle* it is said that under this power the President is not limited to the enforcement of acts of Congress according to their express terms. This power includes rights and obligations growing out of the constitution itself. As a result of it the President may protect an officer of the United States in the discharge of his duties.[3]

The second cause of the change in the position of the President is to be found in the interpretation of the constitution made by the first Congress relative to the power of removal. The constitution gave the power of removal to no authority expressly. The question came up before the first Congress in the discussion of the act organizing the department of foreign affairs. Although there was a difference of opinion in the Congress as to who under the constitution possessed

[1] Art. ii., sec. 3.
[2] Elmes, *Executive Departments*, 13, 14.
[3] 135 U. S., 1., 64, 68.

this power, it was finally decided by a very small majority that the power of removal was a part of the executive power and therefore belonged to the President. This was the recognized construction of the constitution for a great number of years, although it did not meet with the approval of some of the most eminent statesmen.[1] After more than three quarters of a century Congress deliberately reversed this decision and by the tenure-of-office acts of 1867–9 (later incorporated in the Revised Statutes as sections 1767–1769) decided that the constitution had not impliedly or expressly settled this point, and that Congress was therefore the body to decide who possessed the power of removal. Congress then decided that the power of removal of senate appointments belonged to the President and the senate.[2] For twenty years this was the law of the land though no one was able to explain exactly what the tenure-of-office acts meant, on account of the obscurity of their wording; but finally in 1887 Congress repealed them. The result is that the early interpretation of the constitution must be regarded as the correct one at the present time. That is, the President alone has the power of removal of even senate appointments. Though the tenure-of-office acts had the effect of temporarily weakening the power of the President, the complete power of removal had existed so long as to determine the position of the President in the national government and has been of incalculable advantage in producing an efficient and harmonious national administration. The benefits which

[1] This construction was approved by the United States Courts in United States v. Avery, Deady, 204.

[2] This was constitutional, United States v. Avery, Deady, 204.

followed the interpretation of the first Congress on this question were unquestionably the reason why the tenure-of-office acts were finally repealed. From this power of removal has been evolved the President's power of direction and supervision over the entire national administration. To it is due the recognition of the possession by the President of the administrative power.

3. *Power of direction.*—The power of direction and control over the administration through which the President has become the chief of administration is hardly recognized in the constitution. The only provision from which it might be derived is that which permits him to "require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices."[1] But perusal of the early acts of Congress organizing the administrative system will show that the first Congress did not have the idea that the President had any power of direction over any matters not political in character, while the conception of the executive power possessed by the statesmen of the time, as seen from the examples which have been adduced, goes to corroborate this position. The acts of Congress organizing the departments of foreign affairs and war did, it is true, expressly give the President the power of directing the principal officers of these departments how they should perform their duties, but these were departments which were of a political character. But the act organizing the treasury department[2] contains no reference to any presidential power of direction. It simply says that the secretary of the treasury shall

[1] Art. ii., sec. ii., p. 1.

[2] Sept. 2, 1789.

generally perform all such services relative to the finances as he shall be directed to perform; and the context shows that reference is made to the direction of Congress and not to that of the President. The debates in Congress substantiate this view. Further, the fact that the secretary of the treasury, different from the other secretaries, was to make his annual report, not to the President, but to Congress, shows that Congress intended, after the manner of the time, to keep the finances under its own supervision. The administration of the finances which, as has been shown, was really almost the only non-political branch attended to by the central government of the commonwealths served the men of those times as a model for the other purely administrative branches. Thus the post-office was organized at first in such a way as to remove it completely from the control of the President. The appointment of all officers in the post-office was given to the postmaster-general, while the law which finally organized the department in 1825 had nothing whatever to say about presidential control or direction. The original absence of this power of direction is commented upon by one of the United States courts. The court says[1]:

> The legislature may prescribe the duties of the office at the time of its creation or from time to time, as circumstances may require. If these duties are absolute and specific, and not by law made subject to the control or discretion of any superior officer who is by law especially authorized to direct how those duties are to be performed, the officer whose duties are thus prescribed by law is bound to execute them according to his own judgment. That judgment cannot lawfully be controlled by any other

[1] United States v. Kendall, 5 Cranch, C. C., 163, 272.

person . . . As the head of an executive department he is bound, when required by the President, to give his opinion in writing upon any subject relating to the duties of his office. The President, in the execution of his duties to see that the laws be faithfully executed, is bound to see that the Postmaster-General discharges "faithfully" the duties assigned by law; but this does not authorize the President to direct him how he shall discharge them.

The court admits, however, that the President might remove the postmaster-general from office, and it is from this power of removal that we must derive any power that the President has to direct and control the acts of officials in those departments where the law has not expressly provided for the direction and control of the President. So much force did this power of removal have that in 1855, only twenty years after the decision that has been cited was made, we find in an opinion of Mr. Cushing, the attorney-general, the following recognition of the power of direction of the President.[1]

I think . . . the general rule to be . . . that the head of department is subject to the direction of the President. [This was said in relation to duties imposed by statute upon a head of department.] I hold that no head of a department can lawfully perform an official act against the will of the President; and that will is by the constitution to govern the performance of all such acts. If it were not thus, Congress might by statute so divide and transfer the executive power as utterly to subvert the government and change it into a parliamentary despotism like that of Venice or Great Britain, with a nominal executive chief or President utterly powerless—whether under the name of Doge or King or President would then be of little account so far as regards the question of the maintenance of the constitution.

[1] 7 Opinions of the Attorneys-General, 453, 470.

This is, of course, an extreme view, and it is probably not meant by it that the President has any dispensing power by which he might relieve an officer from obeying a positive direction of law, since the law, when constitutional, is always above any executive order.[1] But it indicates, at any rate, the drift of public opinion as to what was the position of the President. Indeed, by this time it was pretty well recognized that the President had a power of direction over all of the departments regardless of the fact whether the law organizing the department had made mention of such a power or not. This may be seen from the celebrated United States bank episode when Andrew Jackson made use of the power of direction, together with the power of removal on which it is necessarily based, to force the secretary of the treasury, notwithstanding the semi-independent position in which the first Congress attempted to place him, to withdraw the national deposit from the bank. This was done in spite of the disapproval of Congress, and no serious attempt was made to condemn his action.[2] The effect of giving to the President these powers of removal and direction has been to give him the administrative power, and to make him the chief of administration. The result of our national development has been a great enlargement of the American conception of the executive power as exemplified in the office of the President. The executive power in the United States, so far as the national government is concerned, embraces both the powers of which it may in theory

[1] Kendall v. U. S., 12 Peters, 524.

[2] See Rüttiman, *op. cit.*, I., 170. For a modern illustration of the presidential power of direction see F. P. Powers on the Guilford Miller case in an article on "Railroad Indemnity-Lands" in the *Pol. Sci. Qu.*, IV., 452, 456.

be composed, and the chief executive authority is at the same time the political and the administrative chief of the government, and has under his direction and control the actions of all the officers of the national government.

CHAPTER III.

THE ORGANIZATION OF THE CHIEF EXECUTIVE AUTHORITY IN THE UNITED STATES.

I.—The President.

It may be said that the executive power possessed by the President of the United States embraces first, the political power, which is sometimes exercised by and with the advice and consent of the senate acting as an administrative council, and second, the administrative power, which is of especial interest to the student of administrative law. This administrative power consists of two classes of minor powers; first, of the powers which relate to the personnel of the administration. These have been discussed in the historical treatment of the President's power. At the present time they are complete, and the President is therefore the head of the national administration, with power to appoint (with consent of the senate for most important officers), remove, and direct all the subordinates. In the second place, the President has powers relative to the administrative services themselves, material rather than personal powers. That is, the President has the right himself to perform a series of acts in the different branches of the national administration.

1. *Administrative powers.*—These powers are to be found in the various acts of Congress relative to the different services by which Congress has conferred powers and imposed duties upon the President, which he is obliged to exercise and perform as a result of his constitutional duty to see that the laws be faithfully executed.[1] Principal among them is the ordinance power which in numerous instances Congress has delegated to the President, and which the President may exercise only as a result of such a delegation. In the exercise of these powers it is not necessary that the President act personally even in the case of duties whose performance has been expressly required of him by law.[2]

The acts by means of which the President performs his duties are either of a general or a special character. Those of a general character are either regulations or instructions, the difference between them being that the former bind both the officials of the government and the citizens as a result of the fact that Congress has delegated to the President the power to issue them, while the latter bind only the officials of the government, and are issued by the President as a result of his power of direction and control over the entire administration. Some of the most important of the general regulations issued by the President are the consular regulations and the civil-service rules. But the most important of the executive regulations are issued, not

[1] See also *In re* Neagle 135, U. S., i, 64, 68; *supra*, p. 64.

[2] Williamson v. The United States, 1 How, 290; 17 Peters, 144. This case decided that an act prohibiting the advance of money to disbursing officers except under the special direction of the President did not require of the President the performance of this direction in every instance under his own hand. For political and judicial acts the courts seem to require the personal action of the President. See Runkle v. U. S., 122 U.S., 543, 557; U. S. v. Page, 137 U. S., 673, 678; *Ex parte* Field, 5 Blatchford, 63.

by the President, but by the different heads of departments, though the President is regarded as responsible for them all and to have acted through the heads of departments.[1]

The other class of the President's acts are of special and not general application, and are directions or orders issued to a single head of a department and decisions in those few cases where it is recognized that the President has the power of deciding appeals from the decisions of his subordinates. The latter power of decision on appeal is not generally recognized as belonging to the President. Indeed it has been laid down as the general rule that the President has no power to correct by his own official act the errors of judgment of incompetent or unfaithful subordinates[2]; and that the individual has no right of appeal from the decision of a head of a department to the President[3]; and that where an appeal lies it can go no further than to the head of a department.[4]

The only case where an appeal lies to the President is where the question to be decided is as to the jurisdiction of the officer whose decision is appealed from. Here the appeal seems to be permitted.[5]

2. *Remedies against the action of the President.*— There are, it may be said, almost no remedies against the action of the President. The President is neither

[1] Wilcox v. Jackson, 13 Peters, 498, 513; U. S. v. Eliason, 16 *Id.*, 291; Confiscation Cases, 20 Wall. 92, 109; U. S. v. Farden, 99 U. S., 10, 19; Wolsey v. Chapman, 101 U. S., 755.

[2] 4 Opinions of the Attorneys-General, 515; but see the Guilford Miller case. *Supra*, p. 69.

[3] 9 Opinions, 462.

[4] 10 *Ibid.*, 526.

[5] 15 *Ibid.*, 94, 100. This opinion was given in 1876, and is very valuable, as in it are collected and reviewed all the opinions of the attorneys-general on this point.

civilly nor criminally responsible to the courts.[1] Nor can the courts review his acts where the attempt will bring them in direct conflict with him.[2] The only cases where the courts can exercise any control over the President are those in which a regulation or order of the President comes up before them for execution when, if they regard it as an act in excess of the President's powers, they may refuse to enforce and declare it null and void.[3] But even in these cases where the action of the President is regarded as political in its nature the courts will refuse to interfere.[4]

II.—The commonwealth governor.

1. *The governor a political officer.*—The originally political character of the governor[5] has tended to become more prominent, largely on account of the grant to him of the limited veto power. His political powers consist in the first place of military powers, which are always exercised subject to the limitations contained in the United States constitution. This provides that the militia of the several commonwealths shall be under the command of the President when in the actual service of the United States.[6] These military powers consist for the most part of the commandership of the commonwealth militia and include also the military administration as there is no commonwealth secretary of war.[7] This fact is due probably to the possession

[1] Durand v. Hollis, 4 Blatchford, 451, which also claims irresponsibility for his subordinates when executing orders issued in the discretion of the President.

[2] *Infra*, II., p. 208; Miss. v. Johnson, 4 Wall, 475.

[3] The Schooner Orono, I. Gallison C. C., 137; *Ex parte* Merryman, 9 American Law Register, 524.

[4] *Supra*, p. 34.

[5] *Supra*, p. 59.

[6] Const., art. ii., sec. 2, par. 1.

[7] Stimson, *American Statute Law*, p. 41, sec. 202.

by the English crown, at the time the office of governor was established, of the military administration which was considered a part of the royal prerogative. In several of the commonwealths the governor may not act personally in the field unless advised so to do by a resolution of the legislature.[1] As commander-in-chief he has very commonly the power to call out the militia in case of insurrection, invasion, or resistance to the execution of the laws.[2] In some cases here again this right is subject to passage of a resolution to that effect by the legislature. This is so in New Hampshire, Massachusetts, and Tennessee in case of insurrection and in Texas in case of invasion.[3]

The second class of powers possessed by the governor are to be found in the powers he possesses over the actions of the legislature. Thus the governor very generally has the veto power. This includes in many cases the power to veto items in appropriation-bills and usually consists in the power to demand from the legislature a reconsideration of the objectionable bill. On the reconsideration, the bill may be passed usually by a two-thirds vote, in some cases a three-fifths, and finally in some by a simple majority.[4] The governor also has the power to adjourn the legislature in case the two houses disagree as to the time of adjournment[5]; the power to call extra sessions of the legislature[6]; and the power and duty to send to the legislature messages in which he is to give the legislature such information as to the condition of the commonwealth, and

[1] Alabama, Kentucky, Maryland, and Missouri. Stimson, *op. cit.* sec. 297.
[2] Stimson, *op. cit.* sec. 298.
[3] *Ibid.*
[4] *Ibid.*, sec. 305, C.
[5] *Ibid.*, sec. 278.
[6] *Ibid.*, sec. 277.

to recommend such measures as he deems proper.[1] In the third place the governor has very generally the power to grant pardons, reprieves, and commutations of sentences and may remit fines and forfeitures.[2] In some instances treason and conviction on impeachment are excepted from his pardoning power,[3] while in certain of the States the power in all cases is conditioned upon obtaining the consent of the council (Massachusetts, Maine, and New Hampshire), or the senate (Rhode Island), or that of the judges of the supreme court and the attorney-general or a majority of them (Nevada and Florida), or of a board of pardons consisting of "state officers"[4] (Pennsylvania). Finally the governor has in some cases the power to proclaim in accordance with the law the time of general elections. This power is often possessed by the secretary of state.[5]

2. *Power of appointment.*—While the political powers of the governor have increased, his administrative powers have decreased. First among these is the power of appointment. This power was originally rather greater in New York than elsewhere. Here the governor had the power to appoint most officers in the commonwealth, but was subject in the exercise of the power to the necessity of obtaining the consent of the council of appointment formed of members of the senate elected by the assembly.[6] In 1801, however, the power was given to each member of the council to nominate for appointment.[7] The diffusion of responsibility resulting from this amendment at a time when the patronage of the central government of the com-

[1] *Ibid.*, sec. 280.
[2] *Ibid.*, secs. 160, 163, 164.
[3] *Ibid.*, sec. 161.
[4] *Ibid.*, sec. 160.
[5] See Nebraska Compiled Statutes, 1889, p. 453.
[6] *Supra*, p. 56.
[7] Amendment V. to the first constitution.

monwealth was very large[1] resulted in great evils; and the demand began to be made that the patronage of the central government of the commonwealth be lessened. This was done by the constitution of 1821, which abolished the council of appointment and provided that the heads of the executive departments should be appointed by the legislature as had been the rule from the beginning in Massachusetts and Virginia. Most of the officers of the commonwealth in the localities were made elective, and in the few cases in which the power of appointment was left with the governor its exercise was conditioned by the necessity of obtaining the consent of the senate. The constitution of 1846 still further lessened the power of the governor to appoint officers; but since that time there has been a reaction in favor of increasing this power. Amendments to the constitution and statutes, have provided new officers unknown to the original constitution, and these officers are for the most part appointed by the governor and senate. Finally, the general power has been given to the governor to appoint to any position for which no other method of appointment or election has been provided,[2] and to fill vacancies except in the principal "state offices," which are filled by the legislature.[3] The same development has been going on in the other commonwealths with the result that the governor's power of appointment at the present time is as follows:

The governor has the power with the consent of the council or senate to appoint the less important "state

[1] In 1821 the number of civil appointees was 7,000, that of military appointees, 8,000. See schedule in Clark's *Debates of the Convention of 1821*.

[2] N. Y. L. 1892, c. 681, sec. 6.

[3] *Ibid.*, secs. 30, 31.

officers"[1] and almost never any of the local officers; to fill many vacancies until the expiration of the term or the next election, and to fill all offices for which some other method of filling is not provided. This power of appointment is generally based on statute, and therefore may be decreased at any time by the legislature. But in some cases it is based on the constitution,[2] when of course the legislature would have no such power. In a few commonwealths it is provided that the term of the officers to be appointed by the governor and of those to be elected by the people shall expire at the same time that the term of the governor expires, so that the new governor may fill the offices to his satisfaction at the beginning of the term, and so that there will be harmony in general policy between the governor and the elected officers, who it is supposed will belong to the same party as the governor.[3] But this is quite rare.

3. *Power of removal.*—In New York, where the administrative powers of the governor were rather greater than elsewhere, it was provided by the first constitution that the governor had, subject to the necessity of obtaining the consent of the council of appointment, the power to remove almost every important officer in the commonwealth government not judicial in character and not purely local.[4] It is said that "use was made of this power to produce an entire change of officers throughout the state from the highest to the lowest, at any rate in all those cases where the immediate predecessors of the council [of appointment] had made an

[1] But see Florida where he appoints almost all. See Const. 1881, art. v., sec. 17.

[2] See Stimson, *op. cit.*, sec. 202, B.

[3] See Kentucky, General Statutes, secs. 2, 25, 28; Constitution of Nebraska, v., sec. 1; Florida Const. 1881, v., sec. 17.

[4] Const., art. xxvii.

appointment."[1] This gross misuse of the power of removal was one of the reasons why the council of appointment was abolished in 1821. With its abolition the governor's power of removal was greatly diminished. At first the governor lost practically all power of removal, but later a certain power of removal was restored to him; and at the present time the power of removal of the commonwealth governor is as follows:

This power is as a rule confined to the officers whom the governor appoints, though in New York he is permitted to remove all the important "state officers"[2]; and local officers are seldom removable by the governor except in New York where the power to remove local officers is quite large.[3] In almost all cases, however, the exercise of this power is conditioned upon obtaining the consent of the council or senate and upon the finding of cause for removal, which cause is usually either malfeasance in office or neglect of duty, but in a few cases may consist in incompetency.[4] Where cause is the ground of removal, in accordance with the general principles of the administrative law of the United States the person to be removed must be given a hearing.[5] Sometimes pending the removal proceedings the governor has by statute the right to suspend the officer.[6] As in the case of the power of appointment the power of removal is based sometimes on the constitution, indeed generally so, but also in some cases on the statutes when the legislature may take it away.

4. *Power of direction.*—The governor's powers of

[1] Hammond, *History of Political Parties in the State of New York*, I., 289.

[2] Const., art. v., secs. 3, 4; art. x., secs. 1, 3, and 10; L., 1892, c. 681, secs. 22, 23; *cf.* Stimson, *op. cit.*, sec. 266.

[3] L., 1892, c. 681, sec. 23.

[4] *Ibid.*, secs. 22 and 23; Stimson, *op. cit.*, sec. 266.

[5] *Infra*, II., p. 99.

[6] See Indiana Rev. Stats., 1881, sec. 5643.

direction and control over the administrative officers are very small and must of necessity be so, so long as the power of removal is so weak. Further, the statutes seldom give him expressly any such power. The only general exception to this rule seems to be in the case of the attorney-general who is regarded as the legal adviser of the governor and as such subject to his direction.[1] Further, it is very generally provided that the governor may demand information from the various officers, who must also report to him.[2]

5. *The governor's power over the administrative services.*—In addition to these rather limited powers over the personnel of the commonwealth administration the governor has also a few but rather unimportant powers relative to the administrative services. As a general thing, however, these services are managed by the various "state officers" independently of the governor. Among the governor's powers of this character may be mentioned the ordinance power. This, like the ordinance power of the President, is a delegated ordinance power; but different from the national Congress, the commonwealth legislature has not often delegated to the governor any ordinance power. Further, the governor has in several of the commonwealths comparatively extended financial powers. Thus in seven of the commonwealths[3] he is to draw up estimates of the amount of money to be raised by taxation for the purposes of the government; in several commonwealths also all money is to be paid out of the treasury on his order[4];

[1] See, *e. g.*, California Political Code, sec. 380, paragraphs 5, 6, and 7; Georgia Code, sec. 367; Indiana Rev. Stats., sec. 5659.

[2] Stimson, *op. cit.*, sec. 281.

[3] Illinois, Nebraska, West Virginia, Missouri, Texas, Colorado, and Alabama. Stimson, *op. cit.*, sec. 280.

[4] *E. g.* see Code of Georgia, 1882, sec. 76.

and finally in a number he is to examine the accounts of financial officers at stated times and sometimes unexpectedly.[1]

6. *General position of the governor.* — It will be noticed from this description of the governor's powers how different his position in the commonwealth administration is from that of the President in the national administration. Originally occupying about the same relative position, the governor has been stripped of his administrative powers, and has been more and more confined to the exercise of political powers, while the President has been gaining more and more administrative power, until at the present time he makes or unmakes the administration of the United States. It has been impossible for the governor to become the head of the commonwealth administration, because the people of the commonwealth have decided that the governor shall be in the main a political officer. They have lessened his power of appointment, they have all but destroyed his power of removal. He has thus been unable to develop any power of direction. The governor's office has been deprived of all means of administrative development.[2] He is now more than he ever was a political officer. His political powers indeed have tended to increase. This is especially true of the veto power, which now extends to items of bills appropriating money. But because the governor has thus been confined to the

[1] See Virginia Code, sec. 238; Colorado General Statutes, 1883, sec. 1361; Iowa, McLain's Annotated Statutes, 1882, secs. 759, 763; Kansas, Dassler's Compiled Laws, sec. 5964.

[2] The remark of one of the commonwealth governors that all the power he had was "to pardon criminals and appoint notaries" is indicative of the governor's position at the present time.

exercise of political powers his influence upon the welfare of the commonwealth must not be underestimated. He is still a very important officer. His veto power gives him a vast power over legislation, while the little power of removal which he possesses often enables him to punish summarily any gross malconduct on the part of many of the important administrative officers of the commonwealth both at the centre and in the localities.

7. *Remedies against his action.*—The remedies against the acts of the governor are about the same as the remedies provided against the action of the President, though perhaps a little more effectual on account of the fact that the courts are not so careful of avoiding conflict with the commonwealth executive. Thus, while the better rule would seem to be that the courts will not attempt to control his action by attempting to exercise a direct restraint over him,[1] still there are cases in which they have not hesitated to issue direct commands to him, whose disobedience would, in accordance with the usual rules of law, result in his commitment for contempt of court; and they have had little compunction about declaring an act of the governor, in which it would appear that he had considerable discretion, null and void.[2]

[1] High, *Extraordinary Legal Remedies*, 2d Ed., secs. 118, 136; People v. Hill, 13 N. Y. Supplement, 186; *N. Y. Law Journal*, April 13, 1891; affirmed, but on different grounds, in 126 N. Y., 497.

[2] People v. Curtis, 50 N. Y., 321, where it was decided that a warrant of extradition made by the governor in pursuance of an unconstitutional law was void; People v. Lawrence, 56 N. Y., 182, where the court went back of a warrant of extradition issued by the governor, and decided that the affidavits on which the warrant was issued were not sufficient to justify the inference that a legal crime had been committed; People v. Platt, 50 Hun., 454, where the court decided that the act of the governor appointing an officer was without jurisdiction, on the ground that the person appointed was not qualified. See also Dullam v. Willson, 53 Mich., 392.

CHAPTER IV.

THE EXECUTIVE POWER AND AUTHORITY IN FRANCE.

I.—General position.

The office of the chief executive is filled in France by the President, who is elected by the legislature acting in national assembly. His position is, from the administrative point of view, similar to that of the President of the United States, but somewhat more influential, on account of the existence in France of many monarchical traditions and on account of the existence also for so long a time of a hierarchically organized administration, at whose head it is well recognized that the President stands. While from the administrative point of view his position is somewhat more important, from the political point of view his position is considerably less important than that of the President of the United States, particularly on account of the absence of any veto power and on account of the adoption of the principle of the responsibility of his ministers to the legislature.

II.—Adminstrative powers.

1. *Power of appointment.*—His administrative powers relative to the personnel of the official service are to be found in the first place in a wide power of

appointment. He appoints without any limitations whatever to most of the important positions in the administration, the only exception to this rule being that his ministers must have the confidence of the legislature, which by precedent has come to mean the confidence of the chamber of deputies.[1] The President has the power of appointing not only the agents of the central administration, but also most of the officers acting in the localities, such as the prefects in the departments, the under-prefects in the districts, and the treasurers of the departments. Really the only important administrative officer in the localities not appointed by the President is the mayor in the commune, who since 1882 has been appointed by the municipal council.[2] Formerly the power of appointment of the chief executive was much greater than now, the members of all the deliberating bodies in the localities being designated by the central government. These are now elected by the people of the respective localities. In addition to appointing the officers of the active administration, the President also appoints the members of the administrative councils and courts, *viz.*, the council of state,[3] and the council of the prefecture,[4] and the members of all the ordinary courts.[5]

2. *Powers of removal and direction.*—In the second place the President has in the case of purely administrative officers an unlimited power of removal which is even more extensive than his power of appointment since he may remove not only all officers whom he has

[1] L., Feb. 25, 1875, art. 3, Burgess, *op. cit.*, I., 302.
[2] L., March 28, 1882.
[3] L., Feb. 25, 1875.
[4] L., June 21, 1875.
[5] L., Feb. 25, 1875.

appointed,[1] but also may remove the mayors of the communes,[2] and may dissolve the local deliberative and legislative bodies, such as the general council of the department and the municipal councils of the communes.[3] In the third place, the President's power of direction is as great as his powers of appointment and removal. It is, however, the result of tradition rather than of positive law. The administration has been so long hierarchically organized that the idea that the President is the head of the administration, subject always to the principle of ministerial responsibility to the legislature, is universally recognized. Further, the power of removal is so great that the power of direction has the greatest possible administrative sanction.

3. *The ordinance power.*—Among the President's powers which relate not so much to the personnel of the service as to the actual conduct of the administrative business of the government may be mentioned the ordinance power. It is a well recognized principle of French law that the President has a general power to supplement the law by means of ordinances, even where the legislature has not expressly delegated any such power to him. The ordinances are known to the French law as decrees. This power of supplementary ordinance results from the constitutional law,[4] which imposes upon the President the duty of watching over and securing the execution of the laws.[5] The reason why such an interpretation should be put upon this clause, when in the United States a similar clause has

[1] Aucoc, *op. cit.*, I., p. 106.
[2] L., April 5, 1884, arts. 85, 86.
[3] L., August 10, 1871, art. 35; L., April 5, 1884, art. 43.
[4] L., February 25, 1875.
[5] Aucoc, *op. cit.*, I., 108; Ducrocq, *op. cit.*, I., 57; Boeuf, *op. cit.*, 14.

received such a different interpretation, is to be found in the monarchical traditions of the country. It results from the old idea that the residuary governmental power of the land is vested in the chief executive, who may therefore issue ordinances, which supplement existing laws, and do not conflict with either their letter or their spirit. But besides this power of supplementary ordinance many statutes have expressly delegated to the President the power to issue decrees which regulate in detail such points as the legislature has not seen fit to regulate itself. All decrees issued in either of these ways have the same characteristics as the laws which they supplement. They are binding upon individuals who in case they violate them may be subjected to the penalties provided by law.[1] Certain of these decrees are called decrees of public administration, *viz.*, those which the President issues as a result of a delegation of the ordinance power of the legislature. In the issue of these decrees of public administration the President has, as a rule, wider powers than in the case of the supplementary ordinances. For this reason it is a general principle of the French law that the President shall before issuing them ask the advice of the council of state.[2] Wherever the law requires such a formality, its non-observance would make the decree void, though at the same time it is to be noticed that the President is never bound to act in accordance with the advice which has been given by the council of state. This is a peculiarity which is characteristic of the entire French administrative law. The purpose of the provision is to ensure sufficient

[1] See Art. 471, No. 15 of the *Penal Code*.

[2] L., May 24, 1872, arts. 8 and 13; Ducrocq, *op. cit.*, I., 57.

deliberation on important subjects, and at the same time a concentrated responsibility for the action taken, which is always regarded as the action of the officer issuing the decree and not that of the council whose advice is asked. To act is the function of one, to deliberate that of several, is the fundamental principle of French administration.

Besides the general acts or ordinances which the President has the power to issue, he has often the power to issue a decree which affects only some one particular individual case. Thus he opens by means of a decree supplementary appropriations,[1] declares that certain public works are of public utility, which means that the right of eminent domain may be exercised[2]; exercises by special decree the administrative control which is given to the central government over the actions of certain local corporations. This power is not nearly so large now as it formerly was.[3] The President also grants by special decree certain charters and concessions, *e. g.*, for railways of minor importance and for mines.[4] The President must always exercise these powers through one of his ministers, who must countersign his act and thus becomes responsible for it to the legislature.[5]

4. *Remedies against his action.*—The remedies open to the individual against the acts of the President are much greater than under the American system. The control of the courts over his penal ordinances is the same as in the United States. That is, if any one is

[1] L., September 16, 1871, arts. 31 and 32.
[2] L., July 27, 1870.
[3] *Infra*, p. 271.
[4] Boeuf, *op. cit.*, 15.
[5] L., February 25, 1875, art. 3.

prosecuted before the courts for the violation of an ordinance or decree of the President, the courts may refuse to convict on the ground that the decree is not legally made, since the penal code gives the courts the power to punish violations of only ordinances which are legally made.[1] Further, any one may appeal from any act of the President, not of a political character, directly to the council of state, which may annul it if it has been done in excess of the powers possessed by the President or in violation of the law, and may amend and modify it so as to render justice in case it violates an individual right. Finally, any one who deems himself aggrieved by an act of the President may petition the legislature which may hold the minister responsible who has countersigned it.[2]

[1] *Penal Code*, Art. 471, No. 15; Boeuf, *op cit.*, 17.
[2] Aucoc, *op. cit.*, I., 113.

CHAPTER V.

THE EXECUTIVE POWER AND AUTHORITY IN GERMANY.

I.—The prince.

1. *An authority of general powers.*—In Germany, as in France and for the same reason, the conception of the executive power and of the position of the chief executive authority, as exemplified in the prince, is much broader than it is in the United States. Consequently, the chief executive authority is more important, certainly from the administrative point of view, than in the United States. Monarchical traditions have led to the adoption of the theory that the entire governmental power of the land is vested in the prince who is quite irresponsible.[1] But in order that such a theory may not lead in its application to absolute government, a corollary of the principle adds, that the prince may act only in a certain way, and that in order that he act even in that way some one shall be responsible for each one of his acts.[2] The constitution therefore places important limitations on his action, but where no such limitation exists the prince is recognized as having the governmental power. The prince is, different from the American President and governor, not an authority

[1] Schulze, *Deutsches Staatsrecht*, I., 187.

[2] *Ibid.*, Meyer, *Deutsches Staatsrecht*, 186, *et seq.*

of enumerated powers, but is the possessor of the residuum of governmental power in the partition of the governmental power made by the constitution. He may therefore exercise the governmental power in such instances and in such ways as best suit him, provided that the constitution has not given the exercise of the power to some other authority and has not designated the way in which the power shall be exercised. The express limitations upon the power of the prince become thus of the same importance as the enumerated powers of the United States President, and the prince possesses, even in the absence of special grant, provided that the constitution has not taken such power from him, both the political and the administrative powers.

2. *Limitations of his power.*—The constitutional limitations of the power of the prince belong, it is true, rather to the domain of constitutional than to that of administrative law, but they must be considered briefly in order to reach a clear understanding of the position in the administrative system of the German prince.

In the first place, by the princely constitutions the consent of the legislative body is necessary for the validity of all legislative acts affecting the freedom of the person and property[1]; for the fixing of the budget of the expenses and receipts and the levying of taxes.[2] The judicial power, *i. e.*, the decision of controversies in regard to the private and criminal law, has been given to courts over whose actions the prince can exercise no influence whatever.[3] Finally every official act of the

[1] Meyer, *Staatsrecht*, 408; Schulze, *op. cit.*, I., 190.
[2] Meyer, *op. cit.*, 204, 205.
[3] Schulze, *op. cit.*. I., 190.

prince, whatever be its nature, must be countersigned by some one of the ministers who assumes the responsibility for it either to the legislature or to the criminal courts, generally to the latter.[1]

In the second place, the imperial constitution has seriously limited the political powers of the prince although it has not changed the legal theory that the prince possesses all the governmental powers not granted specifically to some other authority. Thus the princes have lost for the most part their diplomatic and military powers[2]; a certain part of their legislative power, indeed almost all their legislative power over the relations regulated by the private law, while certain branches of administration which were formerly attended to by the princes have been transferred to the imperial government.[3]

3. *His administrative powers.*—As a result of these principles and of these limitations the German prince at the present time has the following administrative powers:

a. A wide power of appointment which extends to many of the officers in the localities and is not in any case limited by any principle of ministerial responsibility to the legislature. The prince is not obliged to keep or obtain the confidence of the legislature in the selection of his advisers and agents.[4]

b. The prince has a wide power of removal even of local officers—a power which in some cases may result in the actual dismissal from office of an objectionable officer, in other and most cases may result simply in

[1] Meyer, *op. cit.*, 186; Schulze, *op. cit.*, I., 191, 298.
[2] Const., art. 11.
[3] For the details see the Const., art, 4; Meyer, *Staatsrecht*, 176 *et. seq.*
[4] Schulze, *op. cit.* I., 299, 320.

retiring the officer from active participation in the work of administration. In such cases the retired officer is still regarded as an officer with most of the privileges and duties which are attached to the official relation.[1] This power is also unlimited by the necessity of obtaining or keeping the confidence of the legislature.[2]

c. The prince has a wide power of direction to be exercised, however, in all cases through ministers who become criminally responsible and sometimes responsible to the legislature for all the acts by means of which the power of direction is exercised.[3]

d. The prince has a large ordinance power over all matters which have not been regulated in detail by the legislature.[4] There is somewhat of a conflict among the commentators as to how large this ordinance power is, but the better opinion would seem to be that where the constitution has not assigned limits to the ordinance power, and where the statutes of the legislature have not regulated a given subject, the prince may regulate any matter by ordinance.[5] In accordance with custom based upon this theory many things are in Germany regulated by ordinance, both independent and supplementary ordinance, which in the United States are regulated by statute. This ordinance power must, however, be exercised through some one of the ministers, who must countersign the ordinance and becomes responsible as in the other cases for his acts.

From the juristic point of view the acts of the prince

[1] See *infra*, pp. 94, 118; II., 100.

[2] Schulze, *op. cit.*, I., 341.

[3] *Ibid.*, 298; Bornhak *Preussisches Staatsrecht*, I., 144.

[4] Schulze, *op. cit.*, I., 528 *et. seq.*

[5] Gneist, *Verwaltung, Justiz und Rechtsweg*, sec. 74; Bornhak, *op. cit.*, I., 436.

are in almost all cases the acts of the ministers. The remedies offered to the individual against the acts of the prince must therefore be found in the remedies offered against the acts of the ministers.[1]

II.—The Emperor.

1. *General position.* The German Emperor, who is the chief executive authority in the imperial government, occupies quite a different position from that of the prince in the separate members of the empire. While the prince possesses all the governmental powers which have not been given to some other authority, the Emperor is an authority of enumerated powers. He thus occupies, from the administrative point of view, about the same position which is occupied by the United States President.[2]

The constitution[3] declares that the King of Prussia shall be German Emperor. The provisions of the Prussian constitution relative to the King are of value therefore as to the tenure of the Emperor, but the questions arising therefrom, as well as all questions arising in regard to the political powers of the Emperor, belong to constitutional law and will not be treated here.[4]

2. *Powers relative to the official service.*—The administrative powers of the Emperor relate, in the first place, to the official service of the empire. Among this class of powers may be mentioned a power of appointment. A general power of appointment is given by

[1] For these see *infra*, p. 158; II., pp. 177, 188.

[2] One of the best of the German commentators on this account regards the governmental form of the empire as a republic. Zorn, *op. cit.*, I., 162.

[3] Art. 11.

[4] See Burgess, *op. cit.*, II., 264 *et seq.*

the constitution to the Emperor.[1] This clause is somewhat modified by other provisions, as well as by certain statutes whose result is somewhat to limit the broad power of appointment, by requiring either the presentation or the confirmation of the person to be appointed, by the Federal Council, or a committee thereof.[2] In addition to this general power of appointment, the constitution further gives to the Emperor the sole power of appointing the imperial chancellor,[3] who is the only responsible minister in the imperial administration.[4] The only limitation of this power is to be found in the requirement that the chancellor must be a member of the Federal Council. But this does not amount to much, inasmuch as the Emperor as King of Prussia has the right of appointing several members of the Federal Council. Further a power of removal is to be mentioned.[5] This power of removal is not, however, an arbitrary one. For in accordance with the principles which have been all but universally adopted in the German administrative system, discharge from office may take place only as the result of the conviction by a criminal or a disciplinary court of the commission of a crime, or the violation of official duty.[6] In order, however, to permit the Emperor to secure a harmonious administration, he is permitted to retire most of the officers who occupy places involving the exercise of large discretion. The official relation is not, however, broken by such retirement, but the officer receives a portion, three quarters, of his pay, and is subject to all the duties and enjoys all the privileges

[1] Art. 18, sec. 1.
[2] See *infra*, p. 118.
[3] Art. 15.
[4] Zorn, *op. cit.*, I. 195 *et seq.*
[5] Const., art. 18.
[6] *Cf.* L., March 31, 1873.

connected with the office, with the exception of that of performing official acts.[1]

The power of direction is recognized as existing in the Emperor in accordance with the general principles of a hierarchically organized service, of which the Emperor is the head. This power of direction is, however, exercised under the responsibility of the chancellor, who must countersign all the acts by means of which it is exercised.[2] Exactly what the responsibility of the chancellor is, no one seems to be able to say. All that it practically amounts to, on account of the fact that legislation has never elaborated it, is that the chancellor may be called upon to defend his policy before the Federal Council.

3. *Ordinance power.*—The Emperor is further recognized by the constitution[3] as the head of the administration, and as such has powers and duties affecting the administrative services. He is to execute the imperial laws,[4] and is to represent the empire.[5] He does not, as a result of this position, have any ordinance power except such as may be expressly mentioned in the constitution, or may be delegated to him by the legislature.[6] The constitution has given him the ordinance power in one or two instances, but has not given to him any general power even of supplementary ordinance.[7] In the exercise of this ordinance power it is often necessary that the Emperor get the consent of the Federal Council[8]; and all his ordinances

[1] *Ibid.*, Meyer, *Staatsrecht*, 393.
[2] Const., art. 17.
[3] Arts. 12–19.
[4] Art. 17.
[5] Art. 11.
[6] Zorn, *op. cit.*, I., 132.
[7] Arts. 50 and 63, respectively, give the Emperor the power of supplementary ordinance relative to the posts and telegraphs and the army.
[8] Zorn, *op. cit.*, I., 132.

must be countersigned by the chancellor, who assumes responsibility therefor.[1] In some cases, finally, his ordinances must be submitted to the imperial diet for its approval.[2] In this limited power of ordinance is to be found almost all of the power of the Emperor over the administrative services, all the details being worked out by the chancellor and his assistants.

As the Emperor is irresponsible, there are strictly speaking no remedies against his action, except such as are to be found against the action of the chancellor.[3]

[1] Const., art. 17.
[2] Zorn, *op. cit.*, I., 133.
[3] For these see *infra*, p. 158; II., pp. 177, 188.

CHAPTER VI.

THE EXECUTIVE POWER AND AUTHORITY IN ENGLAND.

I.—General power of the Crown.

The theory which governs the distribution of powers in the English government is in principle the same as that which governs the distribution of powers in the princely governments of Germany. The Crown has the residuum of governmental power. All the governmental powers which have not been expressly granted to some other authority belong to the Crown; and the Crown may act in the exercise of its powers as it sees fit, so far as no express limitations have been put upon its action. The only difference between the English and the German systems is to be found in the fact that in Germany the distribution of governmental powers and the limitations on the exercise of the powers of the executive are to be found in a written constitution, while in England it is the Parliament ultimately which decides what powers shall be exercised by the Crown and how it shall exercise them.[1] This position of the English Crown results from the absolute character of the government established by the early Norman Kings. "The Norman idea of royalty," says Dr. Stubbs,[2] "was very comprehensive . . . It combined all the powers of national sovereighty, as they had been exercised by Edgar and

[1] Burgess, *op. cit.*, II., 198, 199.

[2] *Constitutional History of England*, I., 338.

Canute, with those of the feudal theory of monarchy, which was exemplified at the time in France and the Empire." The King was thus both the chosen head of the nation and the feudal lord of the whole land. Further, the Norman idea of the kingship discarded the limitations which had been placed on either the continental or Anglo-Saxon monarchs—in England, the constitutional action of the witan, and on the continent, the extorted immunities and usurpations of the feudatories.[1] At first the Crown was not hereditary, but later it became so; and its power grew to be absolutely despotic.[2] Soon, however, this despotic power became limited by the necessity of the concurrence of the action of Parliament, which we find well developed by the latter part of the thirteenth century, and whose consent was necessary for the imposition of taxes, and also for the enactment of all rules of law which affected the ordinary relations of individuals. For whatever had once been enacted by Parliament became a part of the *lex terræ* and therefore, in accordance with the old Teutonic principle, could not then be changed without the consent of the people as expressed by Parliament, its representative.[3] Later on, Parliament assumed to itself the right to initiate as well as to approve law; and finally the Crown lost through misuse its original power to refuse its consent to what Parliament does.[4]

[1] *Ibid.*

[2] *Cf.* Gneist, *Das Englische Verwaltungsrecht*, 1884, p. 214 and *passim*. Anson, *The Law and Custom of the Constitution*, II., 56 *et seq.*

[3] See Gneist, *op. cit.*, 207.

[4] Though the general opinion seems to be that the veto power of the Crown has become obsolete, Mr. Todd thought that this power though dormant might be revived. See *Parliamentary Government in England*, 2d edition, II., 390-392; *cf.* also Burgess, *op. cit.*, II., 201.

II.—Limitations on the power of the Crown.

The result of this development is that Parliament has assumed most of the legislative power, since it has by statute regulated most important subjects. The Crown may still, however, regulate any matters which have not been regulated by Parliament and has thus quite a large ordinance power both independent and supplementary.[1] Parliament has also assumed the exercise of the taxing power and has in several cases forbidden the Crown to levy taxes without its consent.[2] The Crown has further lost almost all its judicial power.[3] But it has retained in large part its old executive powers together with the power of ordinance which has already been alluded to. In the exercise of these powers the Crown has, however, been seriously limited in its action. For at the same time that Parliament was developing there was also developing another body by which the action of the Crown has always been more or less controlled. This was the Privy Council.[4] The consent of this body has become necessary for the valid exercise of the ordinance power.[5] Finally, every act of the Crown must be performed under the responsibility of one of the members of the Privy Council who alone are the responsible advisers of the Crown.[6] The adoption of this principle was necessary because the legal theory of the English government assigns to the Crown a position of absolute irresponsibility. The king can do no wrong is one of the fundamental English maxims.[7]

[1] *Cf.* Burgess, *op. cit.*, II., 199.

[2] *E. g.* see Petition of Right, 3 Car. I., c. 1. X.; and Bill of Rights, I. William and Mary, 2d Session, c. 2.

[3] Bill of Rights and the Act of Settlement, 11 and 12 William III., c. II.

[4] For its history see *infra*. p. 122.

[5] Todd, *op. cit.*, II. 80.

[6] *Ibid.*, I., 116, 266.

[7] Anson, *op. cit.*, II., 41.

But with these limitations of the power of the Crown, the Crown may do anything. In certain cases the Crown "acts in Parliament," as the expression is, in others in council, or some privy councillor is responsible for its acts. The English Crown is not therefore an authority of enumerated powers but may do anything which it has not been forbidden to do. The limitations on the power of the Crown become as important in England as the enumerated powers of the President in the United States. What these limitations are has already been shown. As a result of them and of the general theory, the Crown has the administrative[1] as well as the political power. The Crown has the power to create offices, to appoint in many cases their incumbents except in the case of local administrative officers who are usually elected, to remove them except as above, and to direct them how to act. The Crown is therefore the chief of the administration as well as the political head of the government. The position of the Crown is, however, greatly modified by the adoption of the principle that the advisers of the Crown, without whom the Crown cannot act, must possess the confidence of the party in the majority in the lower house of Parliament, must practically be its nominees.[2] This principle of parliamentary responsibility plays the same rôle in England as in France which borrowed it from England. It puts the Crown in the position of reigning but not governing. But, just as in France, the theory of the distribution of powers has a great influence on the action of the administration; for the advisers of the Crown may with the consent of the Crown do everything which this theory permits the

[1] Anson, *op. cit.*, II., 53.

[2] Todd, *op. cit.*, II., 134 and 142.

Crown to do. So long as the Crown and its ministers have the confidence of the lower house of Parliament they have most extensive executive powers, greater perhaps than in any other country. Thus the Crown in council may declare war and make treaties of peace[1] which in all other countries can only be done with the consent of the legislature, or that of one of the houses of the legislature as in Germany. It is only when the Crown and its ministers lose the confidence of the lower house of Parliament that the principle of the freedom of action of the Crown in the exercise of the powers left to it by Parliament is susceptible of limitation. And in such cases it must be remembered that the result of the lack of confidence is not that Parliament proceeds to take action itself but that the Crown has to choose new ministers who will have the confidence of Parliament or dissolves Parliament in the hope that the new house will have confidence in the existing ministers. In all cases it is the Crown and not Parliament which administers.

As the Crown is in theory irresponsible there is no remedy against its acts except such as is to be found against the ministers who may have countersigned the acts of the Crown, thereby assuming responsibility therefor.[2] But, as in the United States and France, the courts may refuse to enforce the ordinances of the Crown in case they regard them as illegal.[3]

[1] *Ibid.*, I., 351 *et seq.*

[2] For the remedies against the acts of the ministers see *infra* p. 158.

[3] Todd, *op. cit.*, I., 461, citing Attorney-General v. Bishop of Manchester, L., R. 3, Eq. 436.

Division 2.— Executive Councils.

CHAPTER I.

THE EXECUTIVE COUNCIL IN THE UNITED STATES.

I.—General position.

By the side of the executive authority there is often placed a council to which is given some sort of a control over executive action. In almost every one of the American colonies there was a body known as the council of the governor, the members of which were appointed by the King, and whose consent was necessary for the validity of certain of the acts of the governor. With the governor it formed one branch of the colonial legislature.[1] When the colonies became independent, in several of them this institution was retained and exists at the present time. Thus in the commonwealths of Maine, Massachusetts, and New Hampshire we find still a governor's council whose consent is necessary for the governor's appointments.[2] In others, the council as such has disappeared, and the powers which it possessed have been transferred to the upper house of the legislature.[3] This is the general rule at the present time and is true of the national government and of the commonwealth of New York.[4]

[1] So in New York, see *supra*, pp. 53, 57.

[2] See Stimson, *op. cit.*, sec. 210, B.

[3] *Ibid.*, sec. 210, C.

[4] *Supra*, p. 77.

The powers which these councils or the senates as executive councils possess at the present are somewhat different in the national and commonwealth governments.

II.—In the national government.

In the national government the only power which the Senate possesses over the administrative acts of the President is the power to refuse its consent to the most important of his appointments. For a time it had also the power to prevent the President from removing those officers for whose appointment its consent was necessary; but with the repeal of the tenure-of-office acts[1] this power was lost.[2] In addition to this control over the purely administrative acts of the President, the Senate also has the power to control one of his political powers. All treaties negotiated by the President must, to be binding upon the government, receive the approval of the Senate to be expressed by a two-thirds vote.[3] These powers which the Senate possesses over the acts of the President must not be classed among its legislative powers. For, though the Senate is an important legislative body, it is at the same time an executive council and the only executive council in the national government; and when acting as such, acts separately and apart from the other legislative body, the House of Representatives. When so acting it is said to be in executive session and may sit at a time when the house of representatives is not in

[1] *Supra*, p. 65.

[2] The Senate has such a power only in those cases in which the statutes of Congress expressly recognize it as *e. g.* in the case of the postmaster-general. United States Revised Statutes, secs. 388 and 389.

[3] Const., art. ii., sec. 2, par. 2.

session, which may not be the case when it is acting as a part of the legislature. Nothing is more common than to see the Senate summoned for a special session when Congress has adjourned or is not in session. Further, the Senate as an executive council may be distinguished from the Senate as a part of Congress by the difference in procedure which is followed in the two cases. When it acts as an executive council its sessions are as a rule secret, while its sessions as a part of the legislature are open to the public. The reason of this rule is to be found in the delicate character of the business which comes before it when acting as an executive council.

III.—In the commonwealths.

While the United States Senate has a control over certain of both the political and the administrative acts of the President, the commonwealth Senate, acting as an executive council, and the governor's council, which is elected by the legislature in Maine,[1] but elsewhere elected by the people,[2] has control over only the administrative acts of the governor. Its control over these administrative acts is, however, more extended than the similar control of the Senate over the acts of the President. For the rule in the various commonwealths is, that the consent of the executive council is necessary not only for appointments but also for removals.[3] What has been said with regard to the separate session of the national Senate when acting as an executive council, may be repeated here.

[1] Maine Constitution, art. 5, 22.

[2] Stimson, *op. cit.*, sec. 202, B.

[3] For New York see *supra*, p. 79. See also Maine Constitution, art. 9, sec. 6; Stimson, sec. 210; *cf.*, Bryce, *American Commonwealth*, I., 468.

IV.—Comparison.

It will be seen from this description of the executive council in the United States that its most important function is to control one of the administrative powers of the chief executive and that this control is exercised especially over his relations with his subordinates. Through it the power has been taken away from the chief executive to constitute the official personnel as he sees fit. This limitation of his power naturally involves a lessening of his responsibility. The evil effects of such a plan may be avoided only through the moderate use by the Senate of its powers of control. In the national government this has fortunately been the policy of the Senate almost from the beginning of our administrative history. It may be laid down as one of the customary rules of our constitutional law that the Senate should permit the President complete freedom in the filling of the most important administrative positions.[1] Almost the only cases in which the Senate habitually exercises any control over the President's power of appointment are the judicial appointments. The Senate has, however, not been so careful to leave the President free hand in the exercise of his political powers. There are not a few cases in our history where treaties negotiated by the President have not obtained the confirmation of the Senate. One reason for the distinction which is thus made is undoubtedly to be found in the fact that the approval of treaties requires a two-thirds vote of the Senate; but another is as undoubtedly to be found in the fact that while the Senate has felt that its control over the President's power of

[1] *Cf.* Rüttiman, *op. cit.*, I., 276, and authorities cited.

appointment should be made use of only in such a way as not to hamper the action and limit the responsibility of the President, it may properly interfere to prevent the conclusion of a treaty which in its opinion is not for the best interest of the country. In administration the President is to be supreme in order that the government may be efficient and harmonious; in his political relations the President is to be subject to some control.

The commonwealth executive council has unfortunately not always adopted this conservative rule, but has frequently made an immoderate use of its power of control over the administrative powers of the governor with the result that the governor's responsibility for appointments has been all but destroyed. Nothing is more common in the commonwealth than to see the Senate reject the governor's appointees for no other reason apparently than that it does not think the appointments conducive to the interests of the political party in control of that body, or in order to force the governor to take some action approved by it.

CHAPTER II.

THE EXECUTIVE COUNCIL IN FRANCE.

I.—History.

The executive council in France has always played a much more important rôle than has been assigned to it in the United States. At one time it was much more important even than now. In its intelligence and fairness were found almost the only guaranty of a good and impartial government.[1] The most important executive council was originally the great council of the king, which at one time discharged almost all the functions of government. From this was developed the Parliament of Paris, the first purely judicial body that France possessed, and the royal council which assumed the administrative powers of the great council.[2] In the reign of Louis XIV the royal council was divided into five sections, each of which attended to certain branches of the administration. The section which corresponded most nearly with our ideas of an executive council was known as the council of despatches.[3] This organization lasted almost unchanged up to the time of the revolution, when the constituent assembly re-organized the government of France and abolished the executive

[1] Aucoc, *op. cit.*, I., 126. [2] *Ibid.*, 127.

[3] *Ibid.*, 128.

council.[1] With the advent of Napoleon, the executive council was revived, a new council, called the Council of State, being established. Under the direction of Napoleon it accomplished an enormous amount of work. Indeed, this was the most brilliant period of the executive council in France. Its duties were largely legislative in character, and it decided all difficulties that arose in the course of the administration of the government.[2] The Council of State was so closely associated with the glories of the empire, that the attempt was made under the government of the restoration to do away with it, but this failed and the council resumed its place in the government. During the government of the restoration, as well as under the July monarchy, the Council of State was regarded as an executive council exclusively, a legislature having been formed in the meantime which relieved it of its legislative duties; but with the republic of 1848 the council was made use of by the legislature to control the acts of the executive authority.[3] During the second empire the legislative functions of the council were very much increased, and it was again almost the only guaranty of impartial government. When the present republic was formed, with a legislative body of great power, the council was again relegated to the position of an advisory executive council, which position it occupies at the present time.

II.—Organization.

The organization of the present Council of State is governed by the laws of May 24, 1872, and July 13, 1879. In accordance with these laws it is composed of thirty-two councillors of state in what is known as

[1] *Ibid.*, 131. [2] *Ibid.*, 132. [3] *Ibid.*, 133.

ordinary service, eighteen councillors of state in what is known as extraordinary service, thirty commissioners (*maîtres des requêtes*), and finally of thirty-six auditors, twelve of whom are of the first class, and twenty-four of the second class. The ministers have the right to attend the deliberations of the general assembly of the council, and to vote on matters affecting their departments, when the council is not acting as a court. The Council of State is, when not acting as a court, presided over by the Keeper of the Seals, minister of justice, and in his absence by a vice-president appointed by the President of the republic from among the councillors of state in ordinary service. The method of appointment for the different classes of the members differs. Thus the councillors of state in ordinary service are appointed and dismissed by the President of the republic after hearing, but not necessarily taking, the advice of the council of ministers.[1] The councillors of state in extraordinary service are chosen by the President of the republic from among the members of the administration, whose advice it is considered desirable to have in important administrative matters. They receive no pay, as do the other councillors of state, and have no vote when the council is acting as a court. The commissioners are appointed by the President of the republic on the presentation of the vice-president of the council and the presidents of the different sections into which the council is divided, and are dismissed after hearing the opinion of these officers. The auditors are appointed as the result of a competitive examination, the auditors of the first class being chosen from those of the second class.

[1] L., Feb. 25, 1875, art. 4.

For all these different classes of officers there are conditions of age whose intention is to secure only those persons from whom the government can hope to obtain the best work. These conditions of age vary from not less than twenty-one and not more than twenty-five years for the auditors of the second class to not less than thirty years for the councillors of state. While the President is not limited in his choice of councillors of state in ordinary service, who are the most important of the members, the intention of the law is to facilitate the choice of such officers from among the commissioners who in their turn will be chosen from among the auditors of the first class. As the subjects for the competitive examination for the position of auditor are law, politics, and political economy the Council of State will ordinarily consist of a body of experts in political and administrative matters whose advice must, in the nature of things, be of the greatest value both to the administration and to the legislature.

The Council of State is divided into four administrative sections and one judicial section. Each of the administrative sections has a certain number of administrative departments to advise; while the judicial section is occupied altogether as an administrative court.[1] The council acts in section, in sections united, and in general assembly. Only the most important matters are attended to in the general assembly, to which they go after examination by one of the sections or by two or more sections united. What affairs are to go to the general assembly is decided by the laws of the country and the by-laws of the council; and where it is provided that any matter shall go to the general

[1] Boeuf, *op. cit.*, citing Decree Aug. 2, 1879.

assembly, where the examination is much more thorough than in the sections, this is an absolutely necessary prerequisite to the validity of the action subsequently taken.[1]

III.—Functions.

The functions of this council are both legislative and administrative. The legislative functions are much less important now than formerly. Its intervention in legislative matters is now altogether optional with the legislature which may send any bill which is before it to the council for its advice. The executive which, it will be remembered, may initiate law, may also send any bill which it is proposed to submit to the legislature to the council for its advice and may by decree designate any of the councillors of state to support any of its bills before the legislature. Its administrative functions are, however, very important. In the first place the advice of the council must be asked for all ordinances of public administration or decrees in the form of ordinances of public administration.[2] When it is remembered that it is the habit of the French legislature to incorporate into the statutes only very general principles and expressly to delegate to the executive the power to regulate details by an ordinance of public administration it will be seen what an important function the Council of State discharges in working out, as it does, the details of almost all statutes. Finally the traditions of the French government lead the President and the ministers to submit to the council all questions which are valuable as offering precedents for future action.[3] This custom alone makes the work

[1] Aucoc, *op. cit.*, I., 144 and 145, citing several decisions of the council.
[2] *Supra*, p. 86. [3] Aucoc, *op. cit.*, L., 143.

of the council very large. Its advice is nearly always asked as to the exercise of the central control which the executive authority possesses over the actions of the localities, and over the recognized religious denominations; as to the grant of charters; and as to many acts in the financial administration. Indeed it may be said that what in this country and in England is done by means of special and local legislation is in France done by the decrees of the President or orders of the ministers issued after hearing the advice of the Council of State.[1] An idea of the extent of the work of the Council of State may be obtained from the fact that from 1861 to 1866, 88,888 matters were submitted to the council.[2] It should be added that the character of the questions which are submitted to the Council of State is almost altogether legal and political. Technical questions are submitted to other councils attached to each of the administrative departments such as the general council of public works and of mines, the committees of infantry, of cavalry, and fortifications, *etc.*, *etc.*[3]

While it is necessary in many cases that the advice of the council must be asked in order that an act of the government be legal it is to be noticed that, in accordance with the principle of French administration that to act is the function of one, which has already been alluded to,[4] the government is never bound by the advice of the council but may reject it if it sees fit.

[1] De Franqueville, *Le Gouvernement et le Parlement Britanniques*, III., 119–228; *cf.* Dicey, *The Law of the Constitution*, 3d Ed. 50.

[2] Aucoc, *op. cit.*, I., 144 citing *Moniteur Universel* March 30, 1862 and Sept. 11, 1868.

[3] Aucoc, *op. cit.*, I., 146.

[4] *Supra*, p. 86.

The French executive council thus differs radically not only in composition but also in functions to be discharged from the American executive council. It is composed of experts in administration while the American executive council is merely a part of the legislature. While the main duty of the American executive council is to control the action of the executive authority in the exercise of the one function, which, in order to secure an efficient and harmonious administration, he should discharge on his own responsibility and subject only to the control which the people may exercise on election day; the duty of the French executive council is to advise the executive in the discharge of the important function of issuing ordinances and to fill up those details of the law which it is the policy of the French that the legislature shall not regulate but shall be regulated by a body of specialists. Even in such matters the French are so afraid of a diffusion of responsibility that they do not permit the executive to be bound by the advice which his council may give him. To permit the Council of State to control the President's power to choose his subordinates would be regarded as a gross violation of the fundamental principles of good administration.

CHAPTER III.

THE EXECUTIVE COUNCIL IN GERMANY.

I.—In the princely governments.

As in France, so in the separate members of the German empire, the executive council was for a time, *i. e.* after the disappearance of the feudal estates, almost the only organ through which the absolute monarchy was at all limited. During this period of its history it was known as the Privy Council.[1] Later the Privy Council became known as the Council of State.[2] In Prussia under Stein and Hardenburg it did an immense work—work mostly of a legislative character inasmuch as there was no legislature in Prussia at the time. In this Council of State were drawn up most of the great laws which did so much towards the reorganization of Prussia at the beginning of this century.[3] It was only natural that, when the revolution of 1848 brought with it the creation of a legislature, the council should retire into the background although it was not formally abolished.[4] In 1852 the attempt was made to revive the institution with which so much that was good was associated, but failed. It is said that from 1848 to 1883

[1] Stengel, *Organisation der Preussischen Verwaltung*, 55; Meyer, *Deutsches Staatsrecht*, 258 and 259.

[2] Stengel, *Organisation, etc.*, 60.

[3] *Ibid.*, 67.

[4] Loening, *Deutsches Verwaltungsrecht*, 70.

the council met but twice.[1] Again in 1883 the attempt to revive it was repeated and of late it seems to be acting once more. The reason for this second attempt was to obtain a body to which the government might have recourse for advice as to bills which it was intended to submit to the legislature. But its composition is not such as to secure a body similar to the French council, as it is to be composed of prominent personages appointed by the King as he sees fit.[2]

In addition to this council which has not as yet attained to any great importance there is in Prussia a council of a somewhat special character, formed by ordinance of November 17, 1880, and called the Council for Economical Affairs. It is composed of seventy-five members, chosen for the most part from men engaged in the pursuit of commerce, manufacturing industry, and agriculture. It is divided into three sections, each of which represents one of these three pursuits, and is presided over by the competent minister. The duties of the council are to give its opinion in regard to all projects of law or ordinances which affect the most important economical interests, and to consider what shall be the vote of Prussia in the Federal Council on these matters. As a rule, the government is under no obligation to consult this council.[3]

In some of the other members of the empire, notably in Bavaria and Würtemberg, a council of state is to be found, but as in Prussia it is of little importance as an executive council.[4]

[1] *Ibid.* [2] *Cf.* Bornhak, *Preussisches Staatsrecht*, II., 396.
[3] Bornhak, *op. cit.*, II., 396; Loening, *Deutsches Verwaltungsrecht*, 70.
[4] *Cf.* Stengel, *Wörterbuch des Deutschen Verwaltungsrecht*, art. *Staatsrat.*

II.—In the empire.

1. *Organization.*—In the empire the Federal Council, which is also the upper house of the legislature, has, as an executive council, a series of executive functions to discharge. While resembling those discharged by the United States Senate when acting in a similar capacity, these functions are of much greater importance. So important indeed are the executive functions of the Federal Council that some of the German commentators regard the Federal Council as the chief executive, and relegate the Emperor to the position of its subordinate, who is to carry out its decisions.[1] This body is composed of representatives sent from the twenty-five members of the empire,[2] each of which has a number of votes varying with its importance. All the votes of each member must be cast in the same way and in accordance with instructions which have been issued to its representatives in the council by each of the members of the empire, but the council is not called upon to examine into the correspondence of the vote with the instructions given.[3] The council meets periodically and as an executive council may meet when the other house of the legislature is not in session.[4] It is presided over by the imperial chancellor,[5] and acts either in general assembly or in committees of which four are provided for by the constitution, and three additional by subsequent legislation.[6] The general principles that govern the formation of these committees, exclusive of

[1] *Cf.* Zorn, *op. cit.*, I., 136 to 142.
[2] *Constitution*, art. 6.
[3] *Ibid.*, arts. 6 and 7; Meyer, *Staatsrecht*, 318; Zorn, *op. cit.*, I., 146.
[4] Constitution, arts. 12 and 13.
[5] *Ibid.*, art. 15.
[6] *Ibid.*, art. 8; Zorn, *op. cit.*, I., 148 *et seq.*

that on foreign affairs, are that four members of the empire shall be represented on each committee besides Prussia, which presides. The members of most of the committees are designated by the council, though in a few cases the constitution assures to particular members a permanent seat, and also provides in other cases that the Emperor may appoint the members which are to be represented. The committee on foreign affairs occupies a peculiar position. It was formed to flatter the *amour propre* of Bavaria, Würtemberg, and Saxony. Therefore Prussia is not represented upon it, and it is composed of representatives of these districts and two other members of the empire, to be elected by the council.[1] It is said that this committee has not met once in the history of the empire; so its importance as a controlling factor in the diplomacy of the empire is not very great.[2]

2. *Functions.*—The Federal Council occupies a very peculiar position. It may be regarded as a branch of the legislature and as an executive council for the control of the action of the Emperor, and finally it must be admitted that it is an executive authority which may take action irrespective of the Emperor. Its main function is, however, the control of the action of the Emperor.

Like the United States Senate the Federal Council has a control, in certain respects more, in certain respects less, extended, over the relations of the executive, *i. e.* the Emperor, with the federal official service, *i. e.*, over the personnel of the service. Thus it participates either in general assembly or in committee in

[1] Meyer, *Staatsrecht*, 322, citing the rules of the council.

[2] Zorn, *op. cit.*, I., 151.

the appointment of certain of the imperial officers. The appointment itself is made in theory by the Emperor, but the Emperor in making the appointment is either limited to the names presented by the council or else must consult with it or with one of its committees. The officers appointed in one or the other of these ways are the imperial commissioners to supervise the collection of the customs and the indirect taxes, which are collected by the governments of the separate members of the empire; the judges of the imperial court at Leipsic; the members of the imperial poor-law board, of the imperial disciplinary court and chambers, of the invalid fund commission, and of the directory of the imperial bank.[1] The council further participates in the disciplinary power exercised over the officers of the empire and in the settling of the amount of their pensions.[2] It will be remembered that the Emperor has not the arbitrary power of removal, but that the official relation can be terminated against the will of the officer only by conviction of a crime or by the judgment of a disciplinary court, which may also inflict penalties less severe than discharge from the service.[3] The supreme disciplinary court is composed of five members of the imperial court at Leipsic chosen by the Federal Council and of four members of the Federal Council chosen by it.

The Federal Council further participates in the actual administration of the empire. It is the principal organ for the issue of ordinances and has the supplementary ordinance power.[4] In general a simple major-

[1] Const., art. 36; Zorn, *op. cit.*, I., 156, and authorities cited.
[2] *Ibid.*, 158.
[3] *Supra*, p. 94.
[4] Const., art. 7, secs. 2 and 3; Zorn, *op. cit.*, I., 129.

ity vote is all that is necessary for the validity of an ordinance of the Federal Council. In case of a tie vote, the vote of the presiding state, Prussia, decides,[1] but in certain cases (in the main tax and military matters) the presiding state has the power of unconditionally vetoing a proposition aiming to change existing law.[2] While the Federal Council has the ordinance power in case the constitution has not expressly given it to any other authority, the constitution itself in several cases gives the ordinance power to some other authority and also provides that an imperial statute may give some other authority the power to issue ordinances in particular cases.[3] Finally, it is to be noticed that in several cases, where the constitution or the statutes permit the Emperor to issue ordinances, provision is made at the same time that such ordinances to be valid must have received the approval of the Federal Council.

The Federal Council has also quite a control over the financial administration of the empire. Thus it examines by means of one of its committees the quarterly accounts of the separate members of the empire relative to the customs and indirect taxes collected by them, and in general assembly fixes the amount each member shall pay into the imperial treasury as a matricular contribution.[4] It is also to act as the highest instance of control over the customs and indirect tax administration and has the power to remedy any defect that may appear in the system of collection.[5] The Federal Council is also to examine the accounts of the imperial chancellor so as to see whether he has made

[1] Const., art. 7.
[2] *Ibid.*, art. 7, sec. 2; Zorn, *op. cit.*, I., 131.
[3] *Ibid.*, arts. 35 and 37.
[4] Const., art. 39.
[5] Zorn, *op. cit.*, I., 157.

proper use of the imperial revenue and, in case everything is in order, is formally to relieve him from all responsibility therefor.[1] It exercises a control over the imperial debt and the imperial bank in that it appoints a certain number of the members of the commissions which attend to these matters.[2] Its consent is necessary to all the Emperor's ordinances relative to the war-treasure.[3]

Finally the Federal Council exercises a control over certain of the political acts of the Emperor. Thus its consent is necessary for the declaration of war, for the making of certain treaties,[4] and it is to decide when what is known as federal execution shall be decreed against any member of the empire for neglect or refusal to discharge its duties to the empire.[5] This is a power peculiar to the German imperial system. Though more properly treated in works on constitutional than in those on administrative law, its administrative aspects are so important that it deserves special mention in this connection. Different from the United States constitution the German imperial constitution recognizes expressly in the imperial government the right to enforce by the army if necessary the performance of the constitutional duties of any member of the empire. It is needless to say that up to the present time there has been no occasion for the exercise of this power, but there may be a time when the express mention of such a power will be of great advantage to the imperial government as the existence of such a provision would

[1] Const., art. 72.
[2] L., June 19, 1868, sec. 4; L., March 14, 1875, sec. 5.
[3] L., Nov. 11, 1871, secs. 1 and 5.
[4] Const., art. 11.
[5] *Ibid.*, art. 19.

have been to the United States national government at the beginning of the civil war.[1]

3. *Remedies against its action.*—There are no remedies against the acts of the Federal Council except what are to be found in the power of the courts to declare its ordinances invalid in case it attempts to issue an ordinance in excess of its powers. It would seem that, in accordance with the general principles of German law, the courts have the right to refuse to enforce an unconstitutional ordinance though, it must be said, there appears to be no case in which the courts have so refused. The decisions, however, show a tendency on the part of the imperial court to claim such a power.[2]

[1] As to the difficulty which the national government had in finding some theory upon which could be based its right to put down the rebellion in 1861, see Dunning, "The Constitution in Civil War," in the *Pol. Sci. Qu.*, I., 163.

[2] See Stengel, *Deutsches Verwaltungsrecht*, 180; *Entscheidungen des Reichsgerichts in Strafsachen*, xii., 40; xiii., 321.

CHAPTER IV.

THE ENGLISH PRIVY COUNCIL.

I.—History.

In the discussion of the powers of the English Crown it was shown that at the time the Parliament was developing its legislative powers there was being developed a council which was to control the Crown in the exercise of its executive prerogatives. This council arose out of the old *curia regis*. While the Parliament from the first tried to exercise a control over the taxing and legislative power of the Crown the council was originally formed more to aid the Crown in the performance of its administrative and judicial duties than to control its actions.[1] What its relation to the national council or Parliament was is really unknown.[2] We find, however, in the reign of Henry I a judicial organization called the *curia regis*, which, organized separately as the exchequer, attended also to the financial administration.[3] It was not, however, till the minority of Henry III that a really important council can be spoken of.[4] At that time its existence is clear and its action is traceable in every department of work, and it becomes permanent and continuous.

[1] Stubbs, *Constitutional History of England*, I., 343.
[2] *Ibid.*, 376.
[3] *Ibid.*, 377, 387, and 601.
[4] *Ibid.*, II., 255.

From that time on it contained the officers of state, and of the household, the whole judicial staff, a number of bishops and barons and other members simply called councillors. What the qualifications of the members were is unknown. Its functions were of a varied character, but its distinguishing characteristic was its permanent employment as a court.[1] It had also administrative and executive duties to perform. Thus originated what was soon afterwards and now is called the Privy Council, which from the time of Henry III constantly increased its powers and multiplied its functions, retiring somewhat into the background under strong kings, coming forward under weak or unpopular kings, but always growing in power until it came to be recognized as a power almost co-ordinate with the Crown. It aided the Crown in the performance of its duties and also came finally to exercise a control over its actions.[2] Since the development of the Privy Council in its modern form it has lost a great many of its powers. Most of its judicial functions were taken from it at the time of the abolition of the Star Chamber.[3] Parliament has robbed it of its most important legislative functions, while an informal body known as the cabinet has taken from it actually, though not legally, most of its powers as the adviser of the Crown in the work of administration.

II.—Organisation.

At present the Privy Council is composed of about two hundred persons appointed by the Crown. Every English subject is eligible to appointment.[4] The ele-

[1] *Ibid.*, II., 256.
[2] *Ibid.*, III., 247.
[3] 16 Car., I., c. 10.
[4] 7 and 8 Vict., c. 66, secs. 1 and 2.

ments of which it is formed are at present the same as during the middle ages. These are the chiefs of the various departments, and, as the appointment is practically for life, the chiefs of departments under former administrations, certain judicial officers, and other important officers, such as the Speaker of the House of Commons, the Commander-in-Chief, and a large representation of the secular and ecclesiastical peerage. Legally the position of privy councillor is only for the life of the reigning monarch and six months thereafter, but re-appointment, on the coming to the throne of his successor, is made as a matter of course. Discharge is very infrequent.[1]

This council meets once in three or four weeks at the residence of the Crown, and no member is expected to be present who has not received a special invitation. The quorum is fixed at six with the clerk, whose signature is authentication of its deliberations.[2]

III.—Functions.

The main duty that the council, as council, now has is to advise the Crown as to the issue of ordinances, which are known on that account to the English law as orders in council. Its approval of proposals of ordinances seems to be necessary, since no ordinance not issued in council is valid.[3] This power is really a very important one, since many matters are regulated by orders in council which in this country are attended to by the legislature. Further, as the result of the development within this century of a central adminis-

[1] Gneist, *Das Englische Verwaltungsrecht*, 1884, 103; *cf.* Anson, *op. cit.*, II., 135.

[2] Gneist, *op. cit.*, 194.

[3] *Supra*, p. 99.

trative control, the duty is imposed upon the council of examining a series of ordinances issued by the local authorities whose validity is made to depend upon its approval.[1] Finally its members are the only constitutional advisers of the Crown, and it is only as members of the Privy Council that the various ministers are permitted to advise the Crown.[2] As each member of the cabinet must thus be a privy councillor, it follows that the action and advice of the Privy Council are controlled by the cabinet, so that the existence of the Privy Council does not in any way weaken that responsibility of the ministers for the action of the Crown, which plays such an important rôle in the English governmental system. Out of this Privy Council have been developed several boards, which are really executive departments. Some of these, like the board of trade and the board of agriculture, are now completely separated from the council,[3] while others have not yet attained a similar independence, but the president of the council is regarded as responsible for their action. Such is, *e. g.*, the committee of council for education, commonly known as the education department.[4] Finally we find the judicial committee of the Privy Council, which is a court of appeals for ecclesiastical and colonial cases.[5]

Mention has been made of a cabinet which practically controls the action of the Privy Council. This body was developed largely for the reason that the Privy Council was too large a body to attend effectually to the work of administration. Therefore it was

[1] *Infra*, p. 260.
[2] *Cf.* Anson, *op. cit.*, II., 134.
[3] Anson, *op. cit.*, II., 179 *et seq.*, 186.
[4] *Ibid.*, 187.
[5] Gneist, *op. cit.*, 189.

the habit of the king to choose a certain number of its members in whom he had special confidence and from whom he asked advice. These met together in an inner room or cabinet of the palace, and from this circumstance the name of cabinet was given to the body of ministers whom the king chose to advise him.[1] This practice, after the Restoration, was regarded as a dangerous one, but the cabinet grew more and more in power until at length it drew to itself the chief executive powers in the government, and is now regarded as an essential feature of the English polity. Yet it is altogether unknown to the law; the names of the persons of which it is composed are never officially announced to the public[2]; no record is kept of its proceedings,[3] and it is only as a result of its identity with the controlling factors of the Privy Council that it has any powers.[4]

[1] Todd, *Parliamentary Government in England*, 2nd Ed. II., 92.
[2] *Ibid.*, 181.
[3] *Ibid.*, 178; Macaulay, *History of England*, IV., 435, 437.
[4] For the history of the development of the cabinet, *cf.* Anson, *op. cit.*, 100.

Division 3.—Heads of Departments.

CHAPTER I.

DISTRIBUTION OF BUSINESS AND METHOD OF ORGANIZATION.

I.—Method of distributing business.

In all countries, whether the chief executive authority be the head of the administration or simply the political head of the government, there are officers who are to attend to the details of the administration. The name usually given to such officers is that of ministers, since they are generally regarded as the servants of the chief executive authority and since it is through them alone that he can act. They are regarded as the constitutional organs of the executive for the discharge of his powers, and generally have to countersign every one of his acts for which they assume the responsibility. In addition to this they have in all states almost always the position of chiefs of particular administrative departments whose affairs they are to direct. This is true even in those countries, of which the United States is an example, where they are not responsible for the acts of the executive. On this account the American law has chosen for these officers the title of

heads of executive departments. Since the following pages are devoted to a consideration of their administrative functions, their political functions where they exist being relegated for detailed treatment to constitutional law, these officers will be considered under the title of heads of departments.

It has been shown that in all countries there are five well developed branches of administration, *viz.*, foreign, military, judicial, financial, and internal affairs. All the different matters requiring attention from the administration will fall under one of these five branches. It has come to be well recognized, that the best arrangement of administrative business is to place some one authority at the head of each of these branches, and where it is found by experience to be necessary to make a further specialization, to take out of one of these five departments thus formed some particular matter or matters and form a separate department for its or their management. Thus we generally find that the matter of naval affairs is taken out of the department of military affairs and put in charge of a special department.[1]

Again we find that the care of public works is often given to a separate department. Often also the question of education becomes so important as to demand a separate authority for its management. So also in some states with agriculture and with commerce. In all these cases it will be noticed that the principle of the distribution of administrative business among the

[1] In the United States naval affairs were originally in charge of the war department, but were soon put in a special department, where they have ever since remained. See Guggenheimer on "The Development of Executive Departments" in Jameson, *Essays in the Constitutional History of the United States*, 179. This is an excellent historical sketch of the departments.

departments is the division of the work according to its nature; and to us of the present age any other method of distribution seems preposterous. But this method has not always been followed. In most of the European states all administrative matters were originally attended to by one organ, generally a board or council of some sort. In this body the distribution of business was made according to geographical lines rather than according to the nature of the business to be transacted.[1] Indeed such a system of geographical division was in force in one of the English departments up to quite a late date. Up to 1782 the secretariat of state was divided into the northern and the southern departments, and each division attended to all matters whether internal or external to be attended to in its territorial district. But in 1782 the secretariat was divided into a foreign and a home office.[2] At the present time even, there are a few instances of this system of geographical division. In England there are a secretary for India,[3] one for Scotland,[4] and an Irish secretary.[5] In Germany there is an office for the imperial territory of Alsace-Lorraine,[6] while in the Austro-Hungarian empire there are several instances of such an arrangement.[7]

II.—Power of organization.

An important question connected with the subject of the departments is who shall organize them? Shall it be the executive or the legislative authority

[1] *Cf.* Schulze, *op. cit.*, I., 291.
[2] Cox, *Institutions of the English Government*, 666.
[3] 21 and 22 Vict., c. 106.
[4] 48 and 49 Vict., c. 61.
[5] Todd, *op. cit.*, II., 848.
[6] Zorn, *op. cit.*, I., 428.
[7] Gumplowicz, *Das Oesterreichische Staatsrecht*, 161.

that shall have the organizing power? In the United States it is the legislature alone which possesses the organizing power. The national constitution has not expressly provided for this matter. Indeed, the constitution does not expressly provide for the organization of executive departments, although it impliedly recognizes their existence in two places.[1] It permits the President to require the opinion in writing of the heads of the executive departments, and allows Congress to vest the power of appointing inferior officers in the heads of such departments. The last clause cited speaks of "offices established by law," and has been interpreted in our constitutional practice as giving to the legislature the organizing power. Indeed, it has been the rule from the foundation of the government that the executive departments and offices generally may be established by Congress only.[2] Further, not only are the departments themselves organized by Congress, but also their internal arrangements, and the powers and duties of their heads and of the heads of the various divisions into which they may be divided are often regulated in detail by statute, generally by the statute organizing the department. In some cases it is true Congress will declare that the head of this or that department shall do certain things, and then will leave to him the organization of the particular division which it is necessary to form in order to perform the duty thus placed upon him. But this is now rarely the case, and then only where the most unimportant divisions of the departments are con-

[1] Art. ii., sec. 2, pp. 1 and 2.

[2] *Cf.* Rüttiman, *op. cit.*, I., 274, citing Benton, *Thirty Years' View*, II., 678.

cerned. It was in this way, however, that some of our present administrative departments were developed.

In the separate commonwealths there are seldom to be found in the constitution any express provisions as to the organizing power. The only ones relating at all to the departments are those which themselves organize the executive departments. These are very common and sometimes forbid the establishment of new offices.[1] The result of such provisions is that the constitution-making authority is the organizing power, and not the commonwealth government or any branch thereof. Where, however, the constitution has not made provision, in accordance with the usual rule of interpreting the constitution, it is the legislature and not the executive which has the organizing power. For while the executive is an authority of enumerated powers, the legislature has all governmental power not given to some other authority, if the constitution has not expressly limited its powers.[2] Where the commonwealth legislature acts, however, it does not, as a rule, descend into the same detail as does Congress. The commonwealth statutes are usually absolutely silent as to the divisions which shall exist within a given department. They simply provide for a certain department, and the legislature each year or every two years grants in its appropriation acts a sum of money to the head of the department, leaving him perfect freedom as to its distribution. At the same time it must be noticed that the departments in the common-

[1] See Nebraska Constitution, art. v., sec. 26; *In re* R. R. Commissioners, 15 Neb., 682.

[2] Bank of Chenango v. Brown, 26 N. Y., 469; People v. Dayton, 55 N. Y., 380.

wealth administration are much more special than the national departments, so that in reality the facts are about the same in the commonwealth and the national administration. In the United States, both in the national and the commonwealth government, then, it is the legislature which possesses the organizing power, and in practice it exercises its power in such a way as to regulate in detail the organization of the departments.

In France the rule is not the same. There, with very few exceptions, it has always been recognized that the organizing power belongs to the chief executive authority,[1] subject, however, to the necessity of going to the legislature in case any re-arrangement of offices or the establishment of new offices makes necessary a greater expenditure of money.

In Germany the rule is the same as in France. Of course in both countries the legislature may act if it sees fit when it would be impossible for the executive to make any changes, since a statute is always of greater force than an executive decree or ordinance.[2]

In England the theory seems to be about the same as upon the continent.[3] The only practical difference is to be found in the fact that Parliament has in most of the recent cases of the establishment of an office or a department exercised an organizing power, with the result that most of the departments of any importance owe their existence to a statute and therefore cannot be modified by executive ordinance.

[1] Boeuf, *op. cit.*, 21.

[2] In some instances in Germany the departments are, as in the American commonwealths, fixed by the constitution. *Cf.*, for the organizing power in Germany, Loening, *op. cit.*, 55–57; Schulze, *op. cit.*, I., 297.

[3] Todd, *op. cit.*, I., 609–660.

The method of organization by the executive would seem the preferable one, inasmuch as the executive is in a better position to know the needs of the administration than is the legislature, and is responsible for the actions of the administration. Further it can act more quickly than can the legislature. What the administration gains in stability from the fact of its being organized by the legislature it loses in flexibility. The control which the legislature has over the finances is sufficient to prevent the administration from incurring too great expense in any change that it may wish to make. Indeed the danger of extravagance on the part of the administration is not in modern times so great as it is on the part of the legislature. We have a good instance of this fact and of the disadvantages of giving to the legislature the organizing power in the conditions of the United States customs service. It is the opinion of several of the secretaries of the treasury expressed in their annual reports that there is an unnecessary number of customs collection districts; and the secretaries have repeatedly recommended to Congress the abolition of the less important ones, with of course the mustering out of the service of the officers now assigned to them. But Congress has uniformly refused to follow the suggestions of the secretaries; it has been thought because of the loss which would accrue to the members of Congress as distributors of Federal patronage. If the power of organizing the official service had been recognized in our system as belonging to the President we might hope for some reform in the direction indicated, but so long as it is possessed by Congress it seems almost hopeless to expect that this much needed reform will be accomplished.

CHAPTER II.

TERM AND TENURE OF THE HEADS OF DEPARTMENTS.

The relations of the heads of departments with the chief executive authority are of the greatest importance, for on their nature depends whether there is to be a harmonious administration following out some general plan or whether the head of each department is to be a law unto himself and is to be able to conduct the affairs of his department in such manner as he sees fit regardless of the needs of other departments and of the wishes of the chief executive. These relations of the heads of departments with the chief executive are governed by two things almost entirely, *viz.*, the term and the tenure of office of the heads of departments.

I.—In the United States.

The constitution of the United States and the constitutions of the commonwealths differ considerably in this respect.[1] The former instrument as interpreted gives to the chief executive the power to appoint, remove, and direct all the heads of departments. The commonwealths, however, have pursued a different plan. In most of the original commonwealths the chief

[1] *Supra*, pp. 62–82.

executive did not have the absolute power of appointing the heads of the commonwealth departments. The tendency was to fill these offices at first by appointment by the legislature, as was the rule originally in some of the commonwealths, then by election by the people, which is the rule at present. It is said [1] that "all the executive officers are, as a general rule in all the states, elected by the people at a general election." There are of course a few exceptions to this rule, as, in New York, the superintendents of public works and prisons, who are appointed by the governor and senate.[2] Finally there are still instances of the appointment of heads of departments by the legislature. Thus in New York the superintendent of public instruction is appointed at the present time in this way.[3] As far as the continuance of the term of office is concerned, the methods adopted in the commonwealths differ as much as the methods of filling the offices. But in most cases the term of office of the heads of departments is fixed either by the constitution or the statutes at a certain number of years. The term is not generally the same for all offices, nor does it always coincide with that of the governor.[4] The result is that it is not necessarily the case that all the officers who are to conduct the commonwealth government belong to the same political party or that they share the same views as to the way in which the commonwealth administration shall be

[1] Stimson, *op. cit.*, p. 42, art. 20 B.

[2] Const., art. v., secs. 3 and 4; *cf.* Stimson, *loc. cit.*

[3] L., 1864, c. 555, sec. 1; *cf.* Stimson, *loc. cit.* In some of the commonwealths such a power is regarded as unconstitutional, as being in violation of the principle of the separation of powers. *Supra*, p. 24; State v. Kennon, 7 Ohio St., 560.

[4] *Supra*, p. 78.

conducted. Further the governor cannot usually in case of conflict produce a uniformity in views by the removal of the head of a department.[1]

What now are the relations existing between the chief executive authority and the heads of departments in the American system of administration which result from this state of facts? In the national administration the heads of the departments are completely subordinate to and dependent upon the chief executive authority as a result of the precariousness of their tenure and will be in harmony one with the other and with the President on account of the fact that they have been chosen by him to fill their respective positions as a result of his knowledge of their opinions. We find therefore in the national administration complete guaranties for an efficient and harmonious administration under the direction of the President.

In the commonwealths, however, the case is quite different. Each head of a department has, so long as he is not corrupt, the right to conduct the affairs of his department just about as he sees fit; and is practically independent of the governor who has little or no influence over affairs of administration. The constitutions of some of the commonwealths have been honest enough to recognize what is the real position of the governor and what is that of the heads of the departments, and devote an article to the consideration of the "administrative" officers of the commonwealth, among whom the governor is not included.[2] But whether the constitution recognizes this or not, the fact is the same, that the governor is not the head of the administration

[1] *Supra*, p. 79.

[2] See Florida Constitution, 1881, art. 5, sec. 17.

in the commonwealths of the American Union. American administrative law has added to the famous trinity of Montesquieu a fourth department, *viz.*, the administrative department, which is almost entirely independent of the chief executive and which, as far as the central administration is concerned, is assigned to a number of officers not only independent of the governor but also independent of each other. This independence which each of the heads of departments in the American commonwealths may claim under the law has resulted in there being little attempt made to secure uniformity in administrative action. While in the national government every President tries to surround himself with advisers who have the same general views as to the conduct of the government and calls regular meetings of his heads of departments, popularly termed cabinet meetings, when these heads of departments may exchange opinions on the important questions which come up before them for settlement; in the commonwealths we seldom hear of any such thing as a meeting of the heads of the departments.[1] Such a meeting would be of little use as there resides nowhere the power to compel a head of department to change his opinion so as to suit that of the governor or that of his colleagues. In a word, in the commonwealth administration there are seldom any guaranties for efficient and harmonious action on account of the independent position of the heads of departments not only over against the governor, but also over against each other. This is not merely a theoretical objection to the commonwealth system of administration. For the jealousies and prejudices of the various heads of

[1] But see Florida Const., art. 5, sec. 17, and Iowa Code, 1888, p. 32.

departments and their conflict with the governor do in practice not infrequently lead to an absolute cessation of the work of administration.

II.—In France.

In France, as in the United States national administration, the term and tenure of the heads of departments are such as to place them in a relation of apparently complete dependence upon the President. But French political history has assigned to the ministers a much more important rôle to play. In one of the constitutional laws now in force is contained the provision that the ministers as a body are responsible to the legislature.[1] This means that they must command the confidence of the majority in the chamber of deputies. One of the results of this law has been to make the relation of the ministers, as a body, to the President one of great independence. If no further steps were taken there would be little guaranty for a harmonious and efficient administration under the direction of one person. For each minister is the legal equal of the others. But the French parliamentary system has, in fact, taken another step. It has gradually come to recognize in the president of the council of ministers a superior of the other ministers. He it is who is politically the person exercising the powers which the President has lost over his ministers as a result of the adoption of the principle of the parliamentary responsibility of the ministers. He is actually, though not legally, the chief of the administration. Now in the case of the formation of a new ministry the President "sends for" some prominent statesman,

[1] L., Feb. 25, 1875, art. 6.

who will command temporarily at least the confidence of the Chamber of Deputies, and appoints him president of the council of ministers. As president of such council he has legally no greater powers than his colleagues whom he causes the President to appoint, but actually he it is who is the chief of the French government; and all the other ministers are subordinate to him. He has the power of forcing them out of office in case he is dissatisfied with their actions. For he has the confidence of the President of the republic who has the legal powers of removal and direction. The presidency of the council of ministers is often held by the minister of foreign affairs.

Such is the actual condition of affairs in the French republic. Owing to the possession by the President of the republic of the powers of both chief of government and chief of administration, and to the fact of their exercise by the president of the council of ministers subject to keeping the confidence of the chamber of deputies, there exist still guaranties for the harmonious conduct of the administration, notwithstanding the real weakness of the apparently powerful position of the President of the republic, through the adoption of the principle of the parliamentary responsibility of his ministers.

III.—In Germany.

In Germany the high position of the Emperor and the princes in their respective governments, as the actual as well as the legal chiefs of government and administration, ensures the carrying on of the government harmoniously. The parliamentary system has

never taken root in Germany.[1] In the empire the chancellor is the only responsible minister.[2] All the other heads of departments are simply his subordinates, and are appointed and dismissed by the Emperor on his recommendation.[3] They are merely secretaries of state and must follow the directions of the chancellor. As the chancellor is appointed and dismissed by the Emperor, the heads of the imperial departments are completely dependent upon the Emperor, and sufficient guaranties exist for a harmonious administration.

In the separate members of the empire the conditions are not, however, exactly the same. While the parliamentary system has not taken root in Germany the constitutional system has. This demands that the legally irresponsible prince shall exercise his powers through responsible ministers—ministers responsible at any rate before the criminal courts. For this reason each minister must countersign all important acts of the prince which bear upon his particular department, and thereby assumes the responsibility therefor. The tendency of such a system is of course to break up somewhat the uniformity and harmony of the administration. For a minister might block the action of the prince, although it might be approved by his colleagues, by refusing his counter-signature, or might by his single advice commit the prince to actions which were not approved by his colleagues. Of course much of the danger of such a thing is obviated by the existence in the prince of the power to dismiss a minister who refused to countersign an act which the prince

[1] Schulze, *op. cit.*, I., 299; Meyer, *Staatsrecht*, 184.
[2] Const., art. 17.
[3] Zorn, *op. cit.*, I., 201, citing L., March 17, 1878.

thought was within his powers.[1] But there is provided a further guaranty of harmonious administration in the "state ministry," as it is called. This is composed of all the heads of departments who meet in common session, as a rule under the presidency of the prince, or of one of the ministers designated by the prince and having the title of minister-president.[2] His position is not at all like that of the French president of the council of ministers or the imperial chancellor. On the contrary, though the title of minister-president may bring with it additional dignity, he has no greater legal powers than any of the other ministers, with the exception of presiding over the meetings of the ministry in the absence of the prince.[3] The main function of the state ministry is to preserve harmony and uniformity in the policy of the administration. On this account it is generally settled by law or ordinance what matters shall be decided by it, while further the prince may generally send any matter to it for decision. Among the matters which by law or ordinance are to come before it are all government bills and drafts of general ordinances, the appointment of all the higher administrative officers, and generally all matters which do not come entirely within the competence of one minister. Further, whenever the views of one of the ministers do not coincide with that of the prince the matter is to be submitted to the state ministry.[4] In all of these matters, however, the state ministry acts sim-

[1] *Cf.* Loening, *op. cit.*, 62.

[2] *Ibid.*, 66.

[3] Bornhak, *Preussisches Staatsrecht*, II., 389. In Prussia an ordinance of 1852 has, however, provided that in most matters the ministers shall communicate with the king through the minister-president.

[4] Loening, *op. cit.*, 67.

ply as an advisory body and simply lays before the prince the result of its deliberations and then he decides the matter. Its decisions of themselves have no legal force whatever; and never bind any one of the ministers who does not think that they are right. This, it is believed, would interfere with the principle of the responsibility of the ministers for the acts of the irresponsible prince. But if a minister cannot conscientiously carry out a decision of the state ministry he is at liberty to resign, while, if he does not so resign, the prince has the right to remove him from active participation in the administration.[1] Such are the means adopted in the princely governments of Germany to secure a harmonious administration. The position of the prince as the head of the administration is so well recognized and his right to appoint, dismiss, and direct his agents is so well recognized that theoretically it might be said that the state ministry was a useless institution. It does, however, perform a useful function if it does nothing more than make the advice, which is given to the prince by the heads of departments, uniform. For it is only through the action of the ministers that the action of the prince has any political effects.

IV.—In England.

In England the heads of departments are chosen somewhat in the same way as in France. That is, the Crown, on the occasion of the resignation of a ministry, sends for some eminent statesman who is a recognized leader in one or the other houses of Parliament and who

[1] *Ibid.*, Schulze, *op. cit.*, I., 303.

has the confidence of the party which is in majority in the House of Commons and asks him to form a ministry.[1] If the person so selected accepts the trust, he himself is to select his colleagues.[2] All of the persons whom he selects are ministers though all are not necessarily members of that informal board, the cabinet, which, it has been shown, controls the action of the Privy Council and the Crown. Each is also a privy councillor, and it is in this capacity alone that the ministers may advise the Crown. For a long time it was doubtful whether the cabinet was to act as a board or whether it was to be governed by the wishes of the one member of it who was distinguished from the rest as the prime-minister or premier. Some of the ministers claimed that after their appointment they were responsible to the Crown alone and were in a position of independence over against the prime-minister at whose request they had agreed to act as ministers. This claim led to a conflict between Lord Palmerston who was foreign secretary and Lord John Russell who had been entrusted by the Queen with the duty of forming a ministry and who had chosen Lord Palmerston for the portfolio of foreign affairs. Lord Palmerston sent off certain despatches which had not received the approval of Lord John Russell. The latter officer obtained a note from the Queen in which it was distinctly said that the Queen did not wish any despatches to be sent before they had received her approval. Lord Palmerston disobeyed the order contained in this letter and was dismissed from office.[3] This precedent has finally settled that the

[1] Todd, *op. cit.*, I., 330., II., 183. [2] *Ibid.*, I., 332.

[3] For a full history of this episode see Todd, *op. cit.*, II., 265 *et seq.* *Cf.* also Anson, *op. cit.*, II., 116 *et seq.*

prime-minister is to direct the policy of the government and has a control over the actions of all the other ministers and members of the cabinet—that their relation to the prime-minister is one of dependence. The position of prime-minister is nearly always associated with that of first lord of the treasury. The reason why the first lord of the treasury is generally prime-minister is that the first lord has no portfolio and may devote himself entirely to the consideration of questions of general policy. Further there is associated with this office a much wider power of appointment than is possessed by any other office in the government. It is now generally recognized that the first lord has a control over all appointments which may have an important influence on the general policy of the government. Thus he controls the appointment of all important ambassadors and ministers, certain colonial governors among whom is the governor-general of India, the commanders of the army and navy, the bishops, and the presiding justices of the courts at Westminster, and has the presentation to all the Crown benefices.[1]

From what has been said it will be seen that the acting executive in England is the prime-minister. He controls the actions of the members of the cabinet and the ministers, who are quite dependent upon him and who in their turn control the action of the Crown and the Privy Council and are themselves controlled by the necessity of keeping the confidence of the party in majority in the House of Commons. By this method of developing the principle of parliamentary responsibility there are as in France sufficient guaranties for a

[1] Gneist, *Das Englische Verwaltungsrecht, etc.*, 1884, 218, 219.

harmonious administration notwithstanding that in legal theory the position of each of the ministers is of equal importance with that of any of the others.

V.—Comparison.

This review of the relations of the heads of departments with the acting chief executive shows that the almost universal rule is, that the heads of departments are dependent upon the chief executive; and that, if dependence is not absolutely secured, provision of some sort is made to secure harmony in the action of the administration. The only country which does not make some such provision is the United States. Here though, as a result of the development of the office of President, the national administration has been centralized under his direction, in the separate commonwealths seldom does it seem to be considered necessary to have an administration so formed as either to shut out the possibility of conflict or to settle such conflicts as may arise. The experience of the world is against the administrative arrangements in the commonwealths, and our own experience has shown us that such an arrangement leads to conflicts in the administration which not only diminish its efficiency but in some cases have absolutely caused a cessation of administrative work.

CHAPTER III.

POWERS AND DUTIES OF HEADS OF DEPARTMENTS.

Notwithstanding the general subordination of the heads of departments to the control and direction of the chief executive authority, still in all countries they have a series of duties, generally administrative in character, which they may perform largely independently of the action of the chief executive, in so far as they have not received positive directions from him. This is so even in monarchical governments.[1] More than this is true in the commonwealths of the United States, where the heads of departments often have functions to discharge with which the chief executive has little if any thing to do. First to be mentioned among their powers are those which affect the personnel of the official service.

I.—The power of appointment.

In all the countries under consideration the law grants to each head of department the power to appoint at least the subordinate officers of the department. In the United States national government the constitution provides that Congress may grant to the heads of departments the power to appoint

[1] Loening, *op. cit.*, 62.

to inferior offices.[1] Numerous laws have granted to the heads of departments such a power, so that now the great mass of the officers of the United States national government are appointed by the heads of the departments. Several laws have, however, limited this power in permitting the President to issue rules regulating the mode of appointment. Notable among them is the civil-service law of 1883. Most of the important subordinates of the heads of departments are, however, appointed by the President or the President and Senate.[2]

In the commonwealths the rule is the same. Thus, in New York the Public Officers Law[3] declares that all subordinate officers, whose appointment is not otherwise provided for by law, shall be appointed by their principal officer. It is expressly provided by law that many of the agents of the central government in the localities shall be elected by the people. In some of the commonwealths the power of appointment of the heads of departments is limited in the same way as in the national government. This is so in New York and Massachusetts.[4]

In France the rule is that the heads of departments shall appoint all but their most important subordinates who are appointed by the President. Very few of the subordinates of the departments who are acting in the localities are elected by the people thereof. It is, however, to be noted that many of the subordinate officers of the departments as, *e. g.*, the less important postmasters, are appointed by the representative of the central

[1] Art. ii., sec. 2, p. 2.
[2] See United States Revised Statutes, *passim*.
[3] L., 1892, c. 681, sec. 9. [4] *Infra*, II., p. 35.

government in the localities, *viz.*, the prefect. He appoints many officers who in this country would be appointed by the heads of departments.[1] Where the heads of the departments have the power of appointment, they must be guided in their exercise of the power by the rules laid down in the decrees of the President relative to the method of appointment, which, like our civil-service rules, require often that the appointment shall be the result of a competitive examination open to all persons having the necessary qualifications.[2]

In Germany the rule is very much the same as in France. The law permits the Emperor or the prince, in whom the constitution vests the power of appointment, to delegate the exercise of this power to his subordinates.[3] But laws and ordinances lay down in great detail the qualifications of appointment, which are more severe than in any other country, especially for the higher positions. Finally many of the subordinates of the imperial administration are appointed by the commonwealth governments and not by the heads of the imperial departments,[4] while a few of the subordinates of the princely governments in the localities are elected indirectly by the people.[5]

In England, too, the rule is almost the same.[6] The first lord of the treasury has a greater power of appointment than the heads of the other departments,

[1] Aucoc, *op. cit.*, 119, sec. 62; Block, *Dictionnaire de l'administration française*, 753.

[2] *Infra*, II., p. 47.

[3] Imperial Constitution, art. 18; Meyer, *Staatsrecht*, 363.

[4] Loening, *op. cit.*, 120; Schulze, *op. cit.*, 332.

[5] *Infra*, pp. 303, 307, 315.

[6] Todd, *op. cit.*, II., 532.

having the appointment of all officers who have an important influence on the government.[1] Here, as elsewhere, the heads of departments must be guided in the exercise of their powers of appointment by the rules issued by the Crown relative to the method of appointment, which for the purely subordinate positions is usually as the result of a competitive examination.[2] In England quite a number of the subordinates of the departments in the localities are elected by the people of the localities. This is true of the poor-law and sanitary administration.[3]

II.—The power of removal.

In the United States national government it was early laid down by the courts that the power of removal was incident to the power of appointment.[4] Therefore whenever the heads of departments have the appointing power, they have, in the absence of express statutory provisions to the contrary, the power of removal also. The same rule is true in the commonwealth government.[5] In not a few cases, however, especially in the case of the representatives of the central commonwealth government in the localities, the duration of the office is fixed by statute. Removal in these cases is made only for cause, and then by the governor and not by the heads of departments.[6] Neither in the national nor in the commonwealth government have

[1] Gneist, *Das Englische Verwaltungsrecht*, 1884, pp. 218, 219.

[2] In England these rules are issued by the civil-service commission as a result of the delegation to it of the power by an order in council. *Infra*, II., p. 53.

[3] *Infra*, p. 248. [4] *Ex parte* Hennen, 13 Peters, 230.

[5] People *ex rel.* Sims *v.* Fire Commissioners, 73 N. Y. 437; *cf.* Mechem, *Law of Officers*, sec. 445.

[6] *E. g.* see N. Y. L., 1892, c. 681, sec. 23.

the civil-service laws attempted to limit directly the power of removal of the heads of departments.

In France the power of removal of the heads of departments over their subordinates is practically complete. Whatever officers they may appoint they may also remove.[1] The same is true in England, where the power is exercised in theory by the Crown on the advice of responsible ministers.[2] The power of removal of the head of one of the departments is very much greater than in the matter of appointment. The Local Government Board in London has the right and the sole right to dismiss the subordinate officers of the various boards of poor-law guardians—whose appointment is made by the guardians subject simply to the approval of the local government board.[3]

In Germany, however, the power of removal of the heads of departments is not nearly so great as their power of appointment. As has already been said, the German law generally recognizes office as a vested right which cannot be taken away from its possessor except as the result of conviction of crime, or of a judgment before a regular disciplinary court.[4] In compensation for the absence of this power the heads of departments have the right to impose lighter disciplinary punishments, such as fines, for dereliction of duty.[5]

III.—The power of direction and supervision.

While the different countries differ very little in the matters of the powers of appointment and removal of the heads of departments we find a difference in the

[1] Aucoc, *op. cit.*, I., 119, sec. 62.
[2] Todd, *op. cit.*, I., 629, 636.
[3] 34 and 35 Vict., c. 70.
[4] *Supra*, p. 94.
[5] *Infra*, II., p. 87.

extent of the power of direction. The four countries may be divided into two classes.

1. *United States and England.*—In the one class composed of the United States and England the original conception of the head of a department was that of an officer stationed at the centre of the government who might have, it is true, in many cases the powers of appointment and removal but who was not supposed to direct the actions of the subordinates of his department. This was particularly true of the branch of administration which has been designated the administration of internal affairs, where it may be said that almost everything was attended to in the localities and subject to almost no central supervision. The need of central instruction and supervision was not felt for the reason that the statutes of the legislature descended into the most minute details as to the duties and powers of the officers. The conception indeed of a hierarchy of subordinate and superior officers was very dim, if it existed at all. This is seen in our national administration in the position originally occupied by the collectors of the customs. Though nominally perhaps the subordinates of the secretary of the treasury, the law never recognized that they were subject to his instructions and directions, nor was it the practice to regulate the administrative details by means of central instructions.[1] No one, further, thought in our early history of appealing from the decision of a collector to the secretary of the treasury. In the commonwealths the system was very much the same.

[1] *Cf. Report of the Secretary of the Treasury on the Collection of Duties*, 1885, p. xxxvii; see Eliot v. Swartout, 10 Peters, 37; Tracy v. Swartout, 10 *Id.*, 80.

Almost all the administrative matters affecting the commonwealth were attended to by officers in the localities who were really quite independent, after they had assumed office, of all central instruction, notwithstanding the fact that the most important of them were originally appointed by the central government of the commonwealth. It was not the habit of the central government to send to these officers in the localities instructions as to how they should act in the execution of the law whatever might have been the actual power of the heads of departments. In the commonwealths the system has remained almost unchanged so far as the officers attending to the affairs of the commonwealth in the localities are concerned. Indeed their independence of the heads of the departments of the central commonwealth government is even greater now than it originally was, on account of the fact that they are for the most part elected by the people of the localities in which they act.[1] In some cases the law does recognize a right in a head of a department in the commonwealth to send instructions to the officers in the localities as to how certain branches of administrative work shall be attended to.[2] These cases are extremely rare. But certain matters which were either formerly not attended to at all by the commonwealth administration or which were attended to by the officers in the localities are now attended to directly by the heads of the commonwealth departments and their subordinates who are under central control. Such matters in New York are: prisons, pauper lunatics in most cases, factory inspection, edu-

[1] *Infra*, p. 178.

[2] *E. g.*, the comptroller in New York is authorized by statute to make regulations and issue directions in regard to the transmission to the treasury of public money. L., 1843, c. 44.

cation, railway supervision, *etc.*, *etc.* As to these matters the heads of the commonwealth departments have a large power of direction sanctioned by the power of removal. What has been the exception in the commonwealth administration has been the rule in the national administration. The century of national development has produced perhaps more change in this respect than in any other. The result of this development has been the recognition of an official hierarchy in the national administration with the power in the heads of the departments to reverse or modify, on appeal of persons interested, the decisions of the inferior officers and to direct them how to act.[1] Here again the treasury department offers a good example. Now the collectors of the customs would hardly think of attempting to apply the law in a doubtful case without first receiving instructions from the secretary of the treasury;[2] and the law makes an appeal from the collector of internal revenue to the treasury necessary before the aggrieved party has any standing in court. He must exhaust his administrative remedy before he may resort to his judicial remedy.[3] The same thing is true in many cases in the department of the interior.[4] Finally it has been held that the head of a department may change the erroneous decision of a subordinate officer.[5]

[1] See, *e. g.*, United States Revised Statutes, sec. 251; Butterworth v. U. S., 112 U. S., 50.

[2] *Cf.* U. S. R. S., sec. 2652.

[3] U. S. R. S., sec. 3226; this was the case also in the customs administration until the passage of the late administrative bill, which has taken away the administrative remedy of appeal to the secretary and has provided an appeal to the appraisers. *Cf.* Goss, "History of Tariff Administration in the United States," in *Studies in History, Economics, and Public Law*, I., 155.

[4] *Ibid.*, sec. 2273.

[5] U. S. v. Cobb, 11 Fed. Rep., 76.

In England the development that is to be noticed in this country has also taken place, but even to a greater extent. The reform of the system of local government since 1834[1] has made the English administrative system one of the most centralized in existence. The new department of the interior, *i. e.* the local government board, and also the treasury have the most extended right of direction and control over the numerous local boards which attend to affairs in the localities. This has not failed to have its influence on the other departments, and at the present time the best authority on English administrative law, Professor Gneist, lays it down as a rule[2] that the English heads of departments have a very wide power of issuing instructions and directions to their subordinates throughout the land and thus of guiding the action of inferior administrative officers.

2. *In France and Germany.*—In France and Germany, contrary to the original rule in England and the United States, the officers of the central government have always had the right to issue instructions to their subordinates, among whom were many officers who in England and the United States would be considered local officers, since the central government has had almost from the beginning many representatives in the localities, who were regarded as distinctively central officers.[3] The long existence of such a system has naturally given to the instructions and directions of the heads of departments a much greater importance than they have ever had in this country or in

[1] *Infra*, p. 236.

[2] *Das Englische Verwaltungsrecht*, I., 354 *et seq.*

[3] Aucoc, *op. cit.*, I., 89, 119; Stengel, *Deutsches Verwaltungsrecht*, 163, 164.

England. The laws have never gone into such detail as with us in regard to the duties of the officers, but have left these to be filled out by ordinance and instructions.[1] Indeed it would be almost impossible to understand much of the administrative law without a reference to these ministerial circulars of instructions and directions. Germany and France have thus from the beginning possessed a most centralized system of administration. Now while the tendency in the United States and England has been towards administrative centralization, the tendency in France and Germany has been towards administrative decentralization. Within the last twenty years many matters which formerly were regulated by the instructions of the heads of departments have been put into the hands of the officers of the localities to be attended to in their own discretion, subject, it is true, at times to the supervision of the heads of the departments.[2]

The heads of departments in the four countries have thus the power of direction. The only exception is the case of the heads of departments in the commonwealths in the United States, who do not, as a general thing, have any power of directing their subordinates in the localities how they shall execute the laws.

The heads of departments, like the chief executive authority, have a class of material as well as personal powers—that is, they have direct powers in connection with the administrative services attended to by the government. Among these may be mentioned:

[1] *Cf.* Dicey, *The Law of the Constitution*, 3d. Ed., 50.

[2] Boeuf, *op. cit.*, 118; De Grais, *Handbuch der Verfassung und Verwaltung*, 1883, p. 54.

IV.—The ordinance power.

In all countries the heads of departments have a delegated but only a delegated ordinance power. This is true even in the United States where very few matters comparatively are regulated by ordinance. In the national government in many cases, Congress has delegated to the heads of departments the power to regulate by general orders the details of the administrative law; and when such a delegation has been made the regulations issued as a result of it have a force even upon individuals equal to that of statute.[1] Where such regulations are not clearly based on some legal provision giving the power to issue them the courts do not hesitate to declare them void when they come before them for enforcement.[2] In the separate commonwealths of the United States the ordinance power of the heads of departments is not a large one because the legislature has not seen fit to grant to them this power. In foreign countries also the rule seems to be the same with perhaps the exception of England, where matters are often regulated by the head of a department which on the continent would be regulated by executive ordinance. But even in our national government the administrative regulations, which are issued by the heads of departments as a result of their possession of the delegated ordinance power, are regarded by the courts as the acts of the President, who is supposed to have acted through the heads of departments.[3] These ordinances are to be

[1] *E. g.* U. S. R. S., sec. 251; United States v. Barrows, I. Abbott, U. S., 351, *Ex parte* Reed, 100 U. S., 13, 23; citing Gratiot v. U. S., 4 How., 80.

[2] Little v. Barreme, 2 Cranch, 170; *Ex parte* Field, 5 Blatchford, 63; Campbell v. U. S., 107 U. S., 592.

[3] Willcox v. Jackson, 13 Peters, 498; *supra*, p. 73.

distinguished from ministerial circulars or instructions, which, while general in character like the ordinances, are not like the ordinances binding upon the individual but only upon the officers subjected to the power of direction of the head of the department. Such instructions are based on this power of direction.[1] In Europe the distinction between these two kinds of acts is much clearer than in this country, but even in the United States the United States Supreme Court has held that regulations of departments for the transaction of their business are subject, if they are unjust, to revision by the courts at the instance of individuals who, it would seem, are not in such a case bound by them.[2]

V.—Special acts of individual application.

In addition to these general acts, the heads of departments must, in order to discharge the functions given to them, perform many special acts. They have to make most of the contracts which are made by the government; they must issue orders affecting only one case; they must make decisions either of their own motion or on the appeal of interested parties. The position of the heads of departments is in this respect essentially the same in all countries. In both the continental countries it has for a long time been recognized that any individual who deems himself aggrieved by a decision of a subordinate officer may appeal to the head of the department to have the objectionable decision reversed. This appeal is always allowed even

[1] Boeuf, *op. cit.*, 28.

[2] U. S. v., Cadwalader, Gilp., 563, 577.

where the law has not specifically authorized the taking of such an appeal.[1] The reason of the existence of this right in the individual is to be found in the hierarchical character of the administrative system with the monarch originally at the head, to whom as fountain of justice the individual always had the right to present a petition for justice. In this country, also, although the administration was not hierarchically organized originally, it would seem that the head of a department possesses the power to hear appeals from subordinates' decisions. This power has been given by statute in numerous instances in the national administration but not often in the commonwealth administration, and it is held that the power of direction and control gives the power to hear appeals and correct mistakes.[2]

VI.—Remedies.

In only one of the four countries is there recognized a direct remedy against the general acts of the heads of departments. That country is France where any one may appeal to the council of state to have an objectionable ordinance quashed on the ground that it has been issued by the head of a department in excess of his powers. In all the other countries, as well as in France also, the courts have the right collaterally to declare an ordinance void which has been issued in excess of powers.[3] In almost all the countries, in fact all except

[1] Boeuf, *op. cit.*, 28; Loening, *op. cit.*, 794.

[2] Butterworth v. U. S., 112 U. S., 50, 57, which discusses the appellate power of the secretary of the interior in patent matters. Here, it is said, that "the official duty of direction and supervision implies a correlative right of appeal . . . in every case of complaint although no such appeal is expressly given." See also Bell v. Hearne, 19 How., 252.

[3] For American cases see *supra*, p. 74. See also Stengel, *Deutsches Verwaltungsrecht*, 180; French *Code Pénal*, art. 471, sec. 15.

Germany, there is a remedy against the special acts of the heads of departments. In England and the United States this remedy is to be found in an appeal in the proper form to the courts to overturn or modify the act complained of.[1] In France the appeal goes to the council of state acting as an administrative court.[2]

VII.—Local subordinates of the executive departments.

In all countries certain of the executive departments have scattered about the country in the districts, into which it has for this purpose been divided, subordinate officers who act under the direction and control of the heads of departments. Thus in the United States national administration the treasury department has its collectors, naval officers, surveyors, inspectors, measurers, weighers, and gaugers in the customs and internal-revenue districts; the department of the interior, its land receivers and registers and Indian agents, *etc.*, *etc.* The national administration is highly centralized, rarely making use of the officers of the commonwealth or of the various local corporations within the commonwealths, such as the counties and the towns. While this is also true of certain branches of administration in the commonwealths of the United States[3] and foreign countries,[4] still in many cases the central government, if the government is a federal one as in Germany, makes use of commonwealth officers,[5] or it imposes a series of duties upon officers who are at the same time

[1] *Infra*, II., p. 209.

[2] *Infra*, II., pp. 229, 238.

[3] As, *e. g.*, in New York, the factory inspectors of the labor commissioner, and the various agents of the department of public works.

[4] For France see Aucoc, *op. cit.*, I., 182.

[5] As, *e. g.*, in the case of the customs and the internal indirect taxes.

officers of the local corporations or even upon such local corporations themselves. Thus in the commonwealths of the United States the commonwealth central government often uses county and town officers and the counties and towns themselves—these bodies are indeed primarily administrative districts for the purposes of the general commonwealth administration[1]—as its agents for a series of purposes. For example, in most of the commonwealths the counties and the towns attend to the financial administration of the commonwealth as a whole, defray most of the expenses of the judicial administration, take care of the poor, *etc.*, *etc.*, while the county authority is not uncommonly made the board of canvassers for general elections. The only great difference between the English and American system on the one hand and the continental system on the other, is that the control which the central executive departments have over such local corporations and their officers, both when acting as the agents of the central administration and when acting as the agents of the local corporations, is much less extensive in the former than in the latter. In the United States and England most of the local corporations elect their own officers, who, even when acting as they so often do as agents of the central administration, are quite independent of the heads of the central executive departments[2]; while on the continent such officers are often appointed by the central government and act in all cases more or less under its control.[3] Though not so centralized usually as the United States national administration, the continental system is much more centralized than either the English or the United States commonwealth sys-

[1] *Infra*, p. 173. [2] *Infra*, p. 228. [3] *Infra*, pp. 272, 315.

tem. It must, however, be said that the tendency in England is to put the local corporations and their officers under a strict central control, especially when they are acting as the agents of the central government[1]; while the latest steps taken in Germany tend greatly to relax the formerly strong central control.

[1] *Infra*, p. 259.

BOOK III.

LOCAL ADMINISTRATION.

CHAPTER I.

HISTORY OF RURAL LOCAL ADMINISTRATION IN THE UNITED STATES.

I.—History of rural local administration in England to the eighteenth century.

1. *The sheriff.*—The character of the English system of local government was fixed by the Norman kings. The absolutism of the Norman government reduced all classes of the inhabitants to complete submission to the Crown.[1] On account of the race conflict between Norman and Saxon, the Crown was obliged to establish some system of government by means of which the peace might be preserved and the King might act as the impartial arbiter between the conflicting race elements of the nation.[2] The King therefore districted the kingdom, using in the main the old divisions, *i. e.*, shires which had come down from Anglo-Saxon times, and placed in each district an officer on

[1] Stubbs, *op. cit.*, I., 257, 259, note 1; 260, 338; *cf.* Goodnow, "Local Government in England" in *Pol. Sci. Qu.*, II., 638.

[2] Gneist, *Selfgovernment, Communalverfassung und Verwaltungsgerichte*, 14.

whom he could rely to carry out his plans and enforce his orders. Such districts were not considered to be public corporations. They had no affairs of their own to attend to, but all administrative business was attended to by royal officers placed within them, to wit, the sheriffs or *vice-comites*.[1] The sheriff was always an unpopular officer; he was therefore gradually stripped of his powers and a system of administration established which was more popular in character. But before this was done the strong centralized administration of the Normans had consolidated the people of England into a nation. This was accomplished in England much sooner than on the continent. As a result of the centralization, autonomous communities had no opportunity to develop, and though the administrative system later became really quite decentralized, the same general principles remained true, *i. e.*, the localities remained simply administrative districts without juristic personality and with no affairs of their own to attend to, districts in which royal officers attended to all administrative business. The prefectoral administration of the sheriffs lasted from the time of the conquest to about the reign of Richard II, when changes were made which reduced the sheriff to the position of a ministerial officer of the royal courts, which had sprung up in the meantime, a returning officer for elections and a conservator of the peace.[2] These changes are to be found in the establishment of the office of the justice of the peace,[3] and the subsequent enlargement of its powers.

[1] Stubbs, *op. cit.*, I., 276; *cf. Pol. Sci. Qu.*, II., 639.

[2] See Anson, *op. cit.*, II., 236.

[3] 34 Edward III, c. I.; *cf. Pol. Sci. Qu.*, II., 644, and authorities cited.

2. *The justice of the peace.*—To the justices of the peace were given most of the powers of the sheriff. They further gained control of the parish administration which sprang up in the times of the Tudors in connection with the church, and in their courts of quarter sessions acted as the county authority. They were finally by far the most important officers in the localities, discharging both administrative and judicial functions, and having under their direction almost all other officers in the localities. The system whose whole tone was given by the justices of the peace was much more decentralized than the prefectoral system of the sheriffs. All the officers were chosen in the localities in which they acted. Most of them, it is true, were appointed directly or indirectly by the central government, and could be removed by it. But the fact that they received no salary, although service as a rule was obligatory and arduous, and that they were chosen from the well-to-do classes made the personnel of the service after all very independent, and kept it from falling into bureaucratic ways. For the threat of dismissal from office had little terror for a justice of the peace. Dismissal meant relief from arduous service and not the loss of a means of livelihood. The system thus really secured a high degree of local self-government. The independence of the justices brought it about that the control over their actions, which could be exercised by the central administration, amounted to almost nothing finally. To provide for some sort of central control the statutes of Parliament, regulating the powers and duties of the justices, had to descend into the most minute details. That the justices acted in accordance with these de-

tailed statutes was ensured by the control given to the royal courts over their action, by means of which the courts might, on the application of any person aggrieved by the action of the justices, force them to act as the law required or else quash their illegal action.[1]

II.—The development of the system in the United States.

1. *The three original forms of local administration.* —The justice of the peace system was in full force at the time of the colonization of North America. It is only natural that its main features should characterize the original system of American local administration. We find, however, three pretty distinct forms of it in the different colonies, one in the New England colonies, one in the middle colonies, and a third in the southern colonies. The main distinction between these three forms is to be found in the relative position which was assigned to the areas adopted for the purpose of administration. In New England while the county was recognized[2] it was not nearly so important as the town which was the other area. The town may be taken as the American type of the English parish but it cannot be regarded as the legal successor of the parish. It is really the creation of American statute law, and thus the principles of the common law applicable to the English parish may not be applied to the American town.[3] The town resembles the Anglo-Saxon tunscipe, indeed more than the English parish. This resemblance

[1] *Pol. Sci. Qu.*, II., 648; *infra*, II., p. 200.

[2] Howard in his *Local Constitutional History of the United States*, I., 320, says that the county was formed in Rhode Island in 1703, but was comparatively unimportant. In Massachusetts, however, it is found as early as 1635. See 9 Gray, 512 note.

[3] Morey v. Town of Newfane, 8 Barb. N. Y., 645, 648.

to its old Teutonic prototype would seem to be due more to the fact that the American colonists had to face conditions similar to those before their German forefathers than to any conscious imitation on their part of Saxon institutions.

In the middle colonies also we find both the town and the county. But the functions of administration were quite equally distributed between them or else the town was less important than the county. The latter was especially true of Pennsylvania, where the town was not established until the latter part of the eighteenth century and after its establishment was much less important than the New England town.[1]

In the south social conditions were such as to necessitate the existence of the county alone and to prevent the development during the colonial period of any lesser administrative area at all.

2. *The early American county.*— The county was found in all the American colonies with the exception perhaps of some of the New England colonies where, if it existed at all as an administrative district, it existed in a very rudimentary form. Wherever the county did exist as an administrative district the county authority was, as in England, the court of sessions of the justices of the peace who were appointed by the governor of the colony.[2] By the side of the justices of the peace was the sheriff occupying a position similar to that of the English sheriff of the same period. That is, he was a conservator of the peace, the returning officer for elections, and the ministerial officer of the

[1] Howard, *op. cit.*, I., 385.

[2] For New York see *Documents Relating to the Colonial History of New York*, IV., 25; *cf.* Howard, I., 406.

courts. He was appointed also by the governor.[1] In the court of sessions were centred about all the administrative duties relating to the county. In this court the justices appointed some person to be county treasurer, attended to the county finances and supervised the administration of the poor-law. Acting separately they had charge of police and highway matters and directed the actions of a great number of subordinates who had duties relative to these matters.

The first change to be noticed in the county organization is the substitution of officers elected by the people of the county for these appointed justices. This begins in New York certainly as early as 1691, and probably as early as 1683.[2] In 1691 an officer called a supervisor was to be elected in each town. His name comes from the fact that when these officers from each of the towns in the county were assembled together they formed the county board, and were to "supervise and examine the publick and necessary charge of each county."[3] The motive for this change was probably to provide for the co-existence of local representation with local taxation, since the main duties of the first board of supervisors were relative to the

[1] See Brodhead, *History of New York*, I., 63, and authorities cited.

[2] See Laws of 1691, c. vi. There is in the office of the secretary of state of New York a manuscript law of the date of November 2, 1683, which provides that there should be elected in each town persons "for the superviseing of the publique affaires and charge of each respective towne and county." But as the assembly in New York previous to 1691 was an almost extra legal-body, it is safer to set the introduction of the elective principle in the county organization at 1691.

[3] This system was abolished ten years later by Laws, 1701, c. 96, but was reintroduced by Law of June 19, 1703. This accounts for the mistake which is so commonly made of assigning 1703 as the date of the introduction of the supervisor system in New York.

fiscal administration of the county.[1] The justices still retained important functions in other administrative branches, such as highways.[2] A little later the elective system was introduced into Pennsylvania but in a somewhat different form, the towns not being represented on the county board, probably on account of their unimportance. In 1724 provision was made for the election by the people of the county of three commissioners who were to manage the fiscal affairs of the county.[3] Sheriffs were also elected by the people in Pennsylvania from an early time.[4] This change in the county organization was destined to have a profound influence on the subsequent development of local administration in the United States. As Professor Howard well says[5]: "To New York first, and next to Pennsylvania belongs the honor of predetermining the character of local government in the west. But if New York was first to return to the ancient practice of township representation in the county court it was in Pennsylvania that the capabilities of the independent county were first tested. Here the principle of election to county offices was carried farther than it was ever carried in England.[6] New York is the parent of the supervisor system. On the other hand Penn-

[1] See New York Law of November 1, 1722, where it says: "Whereas by that means," *i. e.* the method of voting provided by the act of 1703, "the inhabitants of several manors, Liberties and Precincts which bear a considerable share of the county rate have not the liberty of chusing their own Supervisors, be it enacted" that they may vote in the town adjoining the manor, *etc.*

[2] *Cf.* Howard, I., 362.

[3] *Ibid.*, I., 382.

[4] *Ibid.*, I., 384, and authorities cited.

[5] *Ibid.*, I., 387.

[6] It is, however, to be noted that the New York law of 1683, above referred to, provided that the county treasurer should be elected by the voters of the county.

sylvania is the originator of the commissioner system." The elective system thus introduced into New York and Pennsylvania has been adopted in almost every commonwealth, and has been extended to almost all county offices at the present time, not only the original county offices but also those which the increase of the work of administration has caused to be provided.

3. *The early American town.*—While we find in the early American county an organization similar to that of the English county of the seventeenth and eighteenth centuries, in the early American town we do not find an organization which resembles very closely the English parish of the same period. The town is, as has been said, an American creation and its development has been quite different in different sections. In New England it is older than the county.[1] In the middle colonies it seems to be a later creation.[2] The town originated either in legislation[3] or in an executive act of the early colonial government,[4] while in some cases it seems to have originated in the settlement of lands bought for this purpose from the Indians by companies of persons who then formed a sort of social compact for their government.[5] Towns formed in this last manner seem at first to have had about all of the attributes of government, but were later absorbed into the colonies and lost in this way all rights but the ordinary rights of self-administration.

[1] We find it in this section as early as 1630, 9 Gray, Mass., 511.

[2] *E. g.*, Pennsylvania, *supra*, p. 166.

[3] As, *e. g.*, in New England, Howard, I., 56.

[4] *E. g.*, in New York where the town of Hempstead, on Long Island, was created by a patent given by Director General Kieft in 1644, Brodhead *op. cit.*, I., 388, and authorities cited.

[5] Wood, *History of Long Island*, 19 *et seq.*

From the very beginning the principle of election by the voters of the town seems to have been the method of filling all the town offices; and in this principle is to be found the great point of difference between American town organization and the English parish organization, and between the positions of the American and English justices of the peace. For in the English parish the justices of the peace appointed ultimately almost all of the parish officers and directed them how to act. The powers of the American justices of the peace over the affairs of the towns were much less extensive. In the New England town the town officers were elected by the town meeting, *i. e.*, the assembly of the political people of the town. The principal officers were the selectmen. They had a general supervision of town affairs, and were to execute the resolutions of the town meeting which was the deliberative body in the town.[1] In addition to the selectmen there was also an almost innumerable list of officers, each of whom attended to some particular matter affecting the welfare of the town. Some of these minor officers were elected at the town meeting, some were appointed by the selectmen.[2] The existence of such a number of officers was necessary because salaries were not paid, and because service was, as a rule, obligatory; for no man could be expected, without compensation, to give up a large share of his time to the performance of public duties. In New York the principal officers of the town after 1691 were the supervisor, two assessors, a constable, a collector, a clerk, highway commissioners or surveyors, and overseers of the poor. They were for the most part

[1] Howard, I., 78.

[2] *Ibid.*, 88, 96.

elected, as in Massachusetts, by the town meeting, which in New York had functions to discharge similar to those discharged by the Massachusetts town meeting with the difference that its sphere of action was not so extended. For the county did a great deal of the work in New York that was attended to by the town in New England.[1] In Pennsylvania we find in the town after its establishment, two overseers of the poor appointed by the justices and two supervisors of highways elected by the people of the town. As the county was much more important in Pennsylvania even than in New York there was very little for the town to do. It was more in the nature of an administrative division of the county than a local organization with its own duties to perform. Therefore the town meeting was not present in the original Pennsylvania plan of local administration.[2]

III.—Corporate capacity of the localities.

1. *Original absence of corporate capacity.*—When the elective principle was made the rule for the filling of offices in the local administrative system the whole local organization became quite popular in character and at the same time quite independent of the central administration, since all possible administrative sanction for instructions issued to the officers in the localities from the central administrative authorities was destroyed. But for a considerable time after this decentralizing of the administrative system the various areas for the purposes of administration, in which these independent officers acted, were, no more than the cor-

[1] See N. Y. L., June 19, 1703.

[2] Howard, I., 385.

responding English areas,[1] regarded as juristic persons.[2] They had no services of their own to attend to apart from the sphere set aside to them by the statutes of the central legislature, which regarded them as agents of the central administration of the commonwealth, nor could they even hold property or sue or be sued.[3] One result of the non-corporate character of towns is to be found in the fact that by common law the property of an inhabitant of a New England town may be taken upon execution on a judgment against the town.[4] The first step in New York towards recognizing that the areas of administration possessed any juristic personality was taken in the case of *North Hempstead v. Hempstead*,[5] which held that a town had a certain corporate capacity though what that corporate capacity was, was not clearly defined. The undoubted corporate capacity of the old Dutch towns, due to the influence of the Roman law and the continental idea of the territorial distribution of administrative functions,[6] seems to have influenced the court in its decision of this case.[7] In 1801 the legislature expressly made the county a capable grantee of lands[8] and finally the

[1] Russell v. The Men of Devon, 2 T. R., 672, A. D. 1788.

[2] Ward v. Co. of Hartford, 12 Conn., 406.

[3] See for New York, which may be taken as typical, the cases of Jackson v. Hartwell, 8 Johnson, 422; Jackson v. Cory, *Ibid.*, 385; Hornbeck v. Westbrook, 9 Johnson, 73; and Jackson v. Schoonmaker, 2 Johnson, 230.

[4] See Bloomfield v. Charter Oak Bank, 121 U. S., 121, 129; Hill v. Boston, 122 Mass., 344, 349.

[5] 2 Wendell, N. Y., 109. In Massachusetts, however, towns were authorized to grant lands in 1635, to sue and be sued in 1694; and were expressly incorporated in 1785. See 9 Gray, Mass., 511, note, which gives a history of the legislation as to towns.

[6] *Supra*, p. 44.

[7] See Denton v. Jackson, 2 Johnson, ch. 320, 355.

[8] I Kent & Radcliff's Laws, 561.

New York Revised Statutes of 1829 expressly declared each county and town to be a body corporate with certain specified powers, to wit, the power to hold property and to sue and be sued.[1] The principle established in Massachusetts and New York has been adopted in most of the other commonwealths of the United States so that it may be said that the American county and town are, where they have any administrative importance, at the present time bodies corporate with these specified powers.[2]

2. *Present corporate capacity.*—But while the result of American development has been the recognition of the local areas as public corporations the further step has not been taken of recognizing that such corporations possess any sphere of local action of their own. The duties attended to by them or by the officers acting within them are regarded as essentially matters of central concern, and the officers, though elected by the people of the localities, are not regarded as local officers in the sense that they are agents of the local corporations. They are simply central officers who are, in accordance with the method adopted in the United States of filling these positions, elected by the people resident in the local areas. The position of the town is well stated in the case of *Lorillard v. the Town of Monroe.*[3]

> The several towns of the state, says Judge Denio, are corporations for special and very limited purposes, or to speak more

[1] The chapter devoted to the towns is explained by the original reports of the revisers to the legislature in 1827 in which it is said that "this article is wholly new in its present form."

[2] *Cf.* Dillon, *Municipal Corporations*, 4th edition, I., chapter ii.; Levy Court v. Coroner, 2 Wallace, 501, 507.

[3] 11 N. Y., 392, 393.

accurately, they have a certain limited corporate capacity. They may purchase and hold lands within their own limits for the use of their inhabitants. They may as a corporation make such contracts and hold such personal property as may be necessary to the exercise of their corporate or administrative powers, and they may regulate and manage their corporate property and as a necessary incident sue and be sued where the assertion of their corporate rights or the enforcement of their corporate liabilities shall require such proceedings. In all other respects, for instance in everything which concerns the administration of civil or criminal justice, the preservation of the public health or morals, the conservation of highways, roads, and bridges, the relief of the poor, and the assessment and collection of taxes, the several towns are political divisions, organized for the convenient exercise of portions of the political power of the state; and are no more corporations than the judicial or assembly districts. The functions and the duties of the several town officers respecting these subjects are not in any sense corporate functions or duties.

The judge goes on to say it is convenient to have the officers chosen in the towns, but they are, when chosen, public and not corporate officers just as much as the highest official functionaries of the state; they are not therefore in any legal sense the servants or agents of the towns.[1] The position of the county, which is quite similar to that of the town is well stated in the case of *Hamilton Co. v. Mighels.*[2] The court says here:

A county is at most but a local organization which for purposes of civil administration is invested with a few functions characteristic of a corporate existence. . . . A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the

[1] See also Town of Gallatin v. Loucks, 21 Barbour, N. Y., 578; City of Rochester v. Town of Rush, 80 N. Y., 302; Sikes v. Hatfield, 13 Gray, Mass., 347; and particularly Hill v. Boston, 122 Mass., 344.

[2] 7 Ohio St., 109, 115.

poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy.

Again in *Talbot Co. v. Queen Anne's Co.*,[1] the court says:

A county is one of the public territorial divisions of the state created and organized for public political purposes connected with the administration of the state government, and especially charged with the superintendence and administration of the local affairs of the community.[2]

It will be seen what a slight recognition there has been, notwithstanding the corporate capacity of the local areas, of the possession by them of any sphere of action of their own as distinguished from their sphere of action as the mere agents of the commonwealth government. Their corporate capacity is made a mere incident to their public governmental capacity and is of value to them only in that through it it is possible for them to own lands and property. But even this property is subject to the regulation of the legislature, which may take it away from them and provide at any time that it may be made use of for some purpose other than that for which it was purchased.[3] Outside of this problematical advantage of holding property which is really more the property of the commonwealth than of the local areas, their corporate capacity is as much a disadvantage as an advantage to them, since

[1] 50 Md., 245, 259.

[2] See also Scales, v. The Ordinary, 41 Ga., 225, 227, 229; *cf.* Dillon, *Municipal Corporations*, 4th edition, I., chap. ii.

[3] See *infra*, p. 202.

while they are able through it to bring suits they are also liable to be sued. This corporate capacity has indeed been so narrowly construed by the courts that it gives the localities no other powers than those already mentioned of owning property, of suing, and of being sued. The courts have held that as a result of it they have no borrowing power[1] and practically that from it there can be derived no principle of *respondeat superior* for the acts of the officers of these local areas. The last point was distinctly held in the cases of *Lorillard v. the Town of Monroe* and *Sikes v. Hatfield*, to which reference has been made. It is true, however, that either general or special statutes have conferred upon the local areas the power to borrow money for a series of specified purposes, the most common of which are to erect county or town buildings, which serve at the same time as the offices of the administrative services of the commonwealth attended to in the county or town; and to aid means of transportation, such as railroads which are being constructed and operated by private companies. But no general sphere of action in which the localities have any independent powers has been derived from the corporate capacity which they possess.

Thus, notwithstanding the great decentralization of the administrative system which has resulted from the development of American local institutions, and notwithstanding the recognition of the juristic personality of the local areas, it cannot be said that the course of American local administrative history has given to the localities any sphere of independent local action. They are, as their English prototypes were after the Norman

[1] Starin v. Town of Genoa, 23 N. Y., 441, 447.

conquest, simply agents of the central administration with, however, a corporate capacity which is to be made use of more for the benefit of the commonwealth as a whole than for the benefit of the particular areas themselves.

12

CHAPTER II.

RURAL LOCAL ADMINISTRATION IN THE UNITED STATES AT THE PRESENT TIME.

I.—The compromise system.

1. *The county.*—The three general types of the English local administrative system which were formed in America at the time of its settlement or which were developed soon after its settlement are still to be found. That developed in New York and Pennsylvania, which provided at a very early period for popular representation in the county authority and which distributed administrative affairs somewhat equally among the two important areas, has had the greatest influence, is at the present time the most widely adopted, and seems destined to become the prevailing type of local administration in the United States. One of the principles on which it was based has been all but universally adopted, *i. e.*, the election of the county authority by the people of the county, who are now defined in accordance with the principles of universal manhood suffrage. This principle has in most cases been extended, in accordance with the Pennsylvania idea, to other officers besides the county authority proper, so that now the usual rule is that all important officers in the county are elected by the people of the county.

For example, the sheriff, the county clerk, the county treasurer, the register or recorder of deeds, the district attorney, and the county superintendent of the poor, where that officer is to be found, are generally elected by the people, and not appointed by the central administration of the commonwealth or by the county authority, as was the case in the original English and American system. In many cases their election by the people is prescribed by the constitution of the commonwealth.[1]

This system of local administration, in accordance with which administrative duties are about equally distributed among the counties and the towns, is called the compromise system, inasmuch as it adopts the extremes of neither the New England nor the southern system. It is found in the middle commonwealths, and in those of the west and northwest. It has even invaded the domain of the southern system in that it has been partially adopted in Virginia, and the domain of the New England system in that it has been partially adopted in Massachusetts and Maine. The compromise system itself, however, presents two quite distinct varieties, to wit, that of New York by which representation on the county authority is given to each of the towns of which the county is composed; and that of Pennsylvania in which the county authority consists of three commissioners elected by the people of the county as a whole. The first is called the New York or supervisor plan, the second is called the Pennsylvania or commissioner plan. The supervisor plan has the advantage of lessening the danger of local discrimination by the county authority, since each locality

[1] See Stimson, *op. cit.*, p. 47, sec. 210 B.

is represented on the county authority; the second or commissioner plan is to be preferred as ensuring a more energetic and efficient administration since there are not so many minds to be made up in the county authority. The supervisor form of the compromise system is to be found in New York, Michigan, Illinois, Wisconsin, Nebraska, and, to a certain extent, in Virginia[1]; the commissioner form of the compromise system is to be found in Pennsylvania, Ohio, Indiana, Iowa, Kansas, and Missouri, and, to a certain extent, in Maine, Massachusetts, Minnesota, and the Dakotas, and has very generally been adopted as the form for the county authority in the commonwealths of the south, where there are in the county generally no lesser districts to be represented.[2] In the compromise system the county authority is then either a board of supervisors, one of whom is elected by the people of each town within the county; or it consists of three commissioners elected sometimes by the people of the county as a whole, sometimes it being necessary that each of the three commissioners shall be elected by one of three election districts into which the county is for this purpose divided. This authority has the general management of the administrative affairs attended to within the limits of the county. In case the commissioner system has been adopted somewhat wider powers appear as a rule to be granted to the county authority.[3] The powers are, however, essentially the same whatever be the method of constituting the authority. They relate to the bridges and roads, the support of the poor and the care of the finances[4];

[1] Howard, I., 439, 453, 465.
[2] *Ibid.*, I., 439.
[3] Howard, I., 442.
[4] *Cf.* Howard, I., 446.

and in many cases include powers which only very indirectly affect the affairs of the county, but are of most interest to the commonwealth as a whole. Thus the county authority has often to publish the laws and election notices for commonwealth elections, acts often as the county board of election canvassers, draws up in some cases the lists of grand jurors, and discharges duties mainly of a financial character in relation to the commonwealth military forces.[1] But the characteristic and most important powers of the county authority are those relating to the county finances. For the expenses of many matters affecting the commonwealth as a whole and not the county, are devolved by law upon the county. Such, for example, are many expenses connected with the administration of justice which, though the courts are recognized now as commonwealth rather than local agencies, are generally borne by the counties. This is in accordance with the old English idea of devolving the expense of almost every administrative service upon the counties or the parishes. We do, however, find certain differences in the different commonwealths in the powers of the county authority relative to the officers acting within the county. While the usual rule would appear to be that the county authority may not be regarded as responsible for the actions of the other officers in the county who are elected by the people of the county, and in some instances, as in New York, may be removed only by the governor and then only for misconduct in office[2]; in one commonwealth at least the administration of affairs in the county is a good deal

[1] See Morehouse's *Supervisors' Manual*, 115, 347, 352, 355, 363.

[2] *Supra*, p. 79.

concentrated in the county authority which has quite a disciplinary power over the other officers in the county. This is Nebraska, where the county authority may hear complaints against any county officer and may remove him for official misdemeanors which are defined in the statutes and are, as in New York, simply misconduct in office. It may remove for this cause a county officer whether he has been elected by the people or appointed by the county authority.[1] If the county board refuses to move upon a complaint made to it on the behavior of a county officer it may be forced to take action by the courts.[2] Again there is a difference in the relations of the county authority to the lesser areas of administration, *viz.*, the towns. While the usual rule would seem to be that the county authority has no control over the administration of the towns, in some of the commonwealths which have adopted the New York form of administration the county authority has considerable supervisory power over the administration of the towns. Thus in this form the towns do not possess the taxing power, but all the town taxes are to be voted by the county authority.[3] Up to 1892 the board of supervisors had in New York another power, which gave it considerable control over the town administration. This was the power to refuse its approval of the incurring of certain expenses by the town, without which approval, such expense would not be a valid charge upon the town; or to direct how town business shall

[1] Compiled Statutes of Nebraska, 1889, p. 369; *cf.* Howard, I., 445.

[2] The State v. Saline Co., 18 Neb., 428.

[3] *E. g.*, New York L. 1892. c. 686, sec. 12; L. 1892, c. 569; L. 1890, c., 568, sec. 139.

be transacted.[1] This power seems to have been taken away by the laws of 1892.[2]

2. *The town.*—The town organization in the compromise system varies considerably more in the different commonwealths than that of the county. In the New York form there is in the first place a town meeting,[3] which is to decide most matters affecting the interests of the town, always in accordance with the statutes giving the town power and, where the county authority has power of supervision over the actions of the town, subject to the approval of the county authority. This town meeting does not however exist in the pure Pennsylvania form,[4] but does in a very rudimentary form in Minnesota and the Dakotas where it may enact by-laws and elect officers.[5] In the pure Pennsylvania plan the functions of the town are discharged by a corps of officers elected by the people of the town.[6]

In the second place the principal town officers differ considerably. In some of the commonwealths, mostly those which have followed the New York form, an officer called by different names, but similar to the supervisor is elected by the town. He is the general executive of the town as a local corporation, has charge of its property, represents it over against third persons, and has a series of duties to perform in various administrative branches, such as public education and public charity.[7] In some cases, however, such officer is not a member of the county board as in the pure New York

[1] *Cf.* Morehouse, *op. cit.*, 303, 344, citing L. 1869, c. 855; L. 1886, c. 355.
[2] N. Y. L. 1892, c. 686. Schedule of laws repealed.
[3] See N. Y. L., 1892, c. 569, Article II.
[4] Howard, I., 157.
[5] *Ibid.*, 158.
[6] *Ibid.*, 157.
[7] For New York see L. 1892, c. 569, sec. 80.

plan. This is the case with the town trustee who is elected by the people of the town in Indiana, Missouri, and Kansas, and with the town chairman who is elected in a similar way in Wisconsin.[1] Generally the actions of such officer are controlled by a town board which in other cases is the only real authority.[2] In some cases the supervisor or similar officer performs other duties, such as those of the assessor,[3] or those of the overseer of the poor.[4] In Michigan he is also census enumerator and registrar of births and deaths.[5] The town board to which reference has been made is variously formed, but generally of the supervisor or similar officer and other minor town officers such as the town clerk, and the justices of the peace who thus still retain certain administrative functions, or the assessors.[6] Besides controlling the action of the supervisor or similar officer, or itself conducting the affairs of the town, the town board has to audit all claims against the town and the accounts of town officers.[7] In New York of late years the attempt has been made to form a separate board of town audit though the old method is still followed in a good many of the towns.[8] In some cases this town board may levy taxes as in Michigan and Ohio.[9] There are quite a number of other town officers

[1] Howard, I., 168, and authorities cited.

[2] The town board is the real authority in Ohio, Pennsylvania, Iowa, Minnesota, and the Dakotas. *Ibid.*, 168–169.

[3] As in Michigan, *Ibid.*, 170.

[4] As in Nebraska and Michigan, *Ibid.*, 170; Cocker, *Civil Government in Michigan*, 26.

[5] Cocker, *op. cit.*, 26.

[6] Howard, I., 172.

[7] *Ibid.*, 172.

[8] See New York Laws of 1840, c. 305; 1860, c. 58; 1863, c. 172; 1866, c. 832; 1875, c. 180, now incorporated in L. 1892, c. 569, secs. 172 *et seq.*

[9] Howard, I., 173.

who attend each to some special branch of administration, such as the town clerk, collector, assessor, overseer of the poor, highway commissioners, and overseers and constables, but these are for the most part officers of the central administration acting within the limits of the town, and cannot be regarded as agents of the town corporation, though they are generally elected by the people of the town.[1] It should be noted that in the compromise system the town is not usually entrusted with the care of the schools, which are attended to by separately organized school districts.[2] Finally, in the compromise system the officers in the town are usually elected by the people of the town; if there is a town meeting, then in the town meeting as in New York,[3] if not, then at a town election, as in Pennsylvania.[4]

II.—The New England system.

1. *The county.*—The characteristic of the New England system of local administration is that the county is almost ignored. Almost all important local administrative functions are centred in the town, even where the existence of the county as a district for certain purposes of administration is recognized. In Rhode Island the county is to be found, but only in an extremely rudimentary form. Here the county is simply a district for the purposes of judicial administration, but seems to have no juristic personality. Officers in the county, like the sheriff and the clerks of certain courts, are elected by the general assembly of the commonwealth.[5] In Vermont also, all real local power is centred in the

[1] *Cf.* Lorillard v. Town of Monroe, 11 N. Y., 392.
[2] Howard, I., 235; Cocker, *op. cit.*, 92.
[3] See statutes cited above.
[4] *Supra*, p. 171.
[5] Public Statutes, 39 and 74.

town; the only administrative business which is given to officers in the county consisting first, of the powers possessed by the sheriff as conservator of the peace and as ministerial officer of the courts and of the powers given to an elected county commissioner to supervise the execution of the laws prohibiting the sale of liquors, which are really enforced by the town agents[1]; second, of the powers given to the assistant judges of the county courts to control the financial administration of the county, appoint the county treasurer, and hear appeals in highway matters[2]; and third, of the powers given to a county equalizing convention, composed of delegates appointed by the town listers or assessors from among their own number, to make quadrennially an equalization of the assessments of the various towns for the purposes of taxation.[3] In Vermont there is no county administrative authority like the board of supervisors or the county commissioners in the compromise system, but all matters affecting the county, not attended to by the special officers mentioned, especially those affecting the financial administration of the county, are attended to by the assistant judges of the county court.

In Connecticut the general assembly of the commonwealth appoints periodically three commissioners in each county, who have the care of the county property and the oversight of the county jail, supervise the county workhouses and levy taxes within certain limits for the repair of the court house and the jail. The fiscal administration of the county, so far as there is any, is attended to by a joint assembly of the senators and representatives for the county in the commonwealth

[1] Revised Laws, 732, 733. [2] *Ibid.*, 517, 573. [3] *Ibid.*, 124, 125.

legislature, who are to meet biennially at the capital of the commonwealth, make appropriations for county expenditure, estimate and apportion the county taxes, and examine the accounts of the county officers. The county treasurer is appointed by the commissioners, the coroner by the supreme court, but the sheriffs are elected by the people of the county.[1]

In New Hampshire there are three commissioners elected by the people of the county, who have, however, little independent power, and are subject to the control of a county convention composed of the representatives to the legislature of the towns of the county. This convention meets biennially, when it may levy taxes, may authorize the commissioners to issue bonds and to repair the county buildings, such authorization being necessary whenever the amount of the repairs exceeds $1,000. The commissioners are to attend to the care of the county paupers and county property, and may lay out highways and establish houses of correction; and, when authorized so to do, purchase and convey real estate. Besides the commissioners, the people of the county elect every two years a sheriff, treasurer, solicitor, a registrar of deeds, and a registrar of probate.[2]

It will be seen from this slight sketch of the county organization in the New England commonwealths that the New England county is in the process of becoming of some importance in administrative matters. It has already in several instances become a body corporate, but as yet it has not succeeded in obtaining a county

[1] General Statutes 1888, 429–32, 434, 740, 748.

[2] General Laws 1878, 80–94. On the general subject of the county administration in New England see Howard, *op. cit.*, I., 459, 464.

authority of any great independence, which is separated from the other departments of the commonwealth government. Thus in Connecticut and New Hampshire, it is under the control of the representatives of the towns in the county to the legislature, while in Vermont the most important administrative functions in the county are discharged by the assistant judges of the ordinary county court. In so far as a county authority has been developed, as *e. g.* the commissioners, who are found in Connecticut and New Hampshire, and it may be added in Massachusetts, where they have larger powers than in any other of the New England commonwealths, the Pennsylvania rather than the New York form is the model that is being copied. The rule as to the filling of the other offices in the county is not at all uniform, in some cases the people of the county electing such officers, in others some other authority having the right to appoint them.

2. *The New England town.*—What the New England county loses in importance the town gains. In the New England towns are centred most of the administrative functions discharged in the localities. In all the towns we find the town meeting similar to the New York town meeting, but generally possessed of greater powers. Thus the town meeting may not only pass by-laws but may also levy taxes, makes all necessary appropriations and decides all town matters, such as the making of contracts[1]; and its action is not subject to the control of any county authority. The town officers are, however, differently organized in New England. The chief officers are still the selectmen.[2]

[1] See Bloomfield v. Charter Oak Bank, 121 U. S., 121; *cf.* for duties and powers of towns, Dillon, *op. cit.*, I., 47, note.

[2] Howard, *op. cit.*, I., 227.

In Rhode Island, however, the town authority is to be found in a council of from three to seven members elected by the town meeting.[1] This body resembles somewhat the town board, which is to be found in some of the western commonwealths, and by which, it will be remembered, most of the business of the town is to be discharged. Often in New England the selectmen, who, like the town council of Rhode Island, are elected by the town meeting, have the right to appoint some of the other town officers, though the rule would seem to be that they also are elected by the town meeting. Everywhere the selectmen have the right to fill vacancies in town offices. The selectmen also discharge many functions which, in the New York form, are attended to by separate officers. Thus in Massachusetts the selectmen act as overseers of the poor while the constable very generally acts as collector of taxes.[2] In New England generally the town is the school district, though there are separate officers to attend to the school administration.[3]

III.—The southern system.

The third type of local administration in the United States is to be found in the southern commonwealths. The main characteristics of this system is that nearly all administrative business, not absolutely municipal in character for which the municipal corporation has been formed, and not affecting education, for which the school district has been formed,[4] is centred in the

[1] *Ibid.*; see also Public Statutes 1882, pp. 109–119.

[2] Howard, I., 227.

[3] *Ibid.*, 235.

[4] As, *e. g.*, in Virginia, Kentucky, Texas, and Tennessee. Howard, *op. cit.*, I., 237.

county and its officers. In some of the commonwealths, however, even school matters are attended to by county officers.[1] In Alabama the district for the purpose of school administration is called the township.[2] It is believed that the introduction of the school district is causing a disintegration of the county and the establishment of a smaller local area.[3]

The county authority in the south presents quite a variety in the forms of its organization. But it may safely be said that the tendency has been to adopt the principle of popular election for not only the county authority but for most of the officers in the county.[4] North Carolina and Tennessee seem to be the farthest behind in this respect. Here the justices of the peace appointed by the general assembly of the commonwealth have large administrative powers, and the sheriff, who is, it is true, elected by the people of the county, has still very many of the fiscal powers of the old Norman sheriff. Thus he is still the collector of taxes and may be the treasurer of the county.[5] It may be further said of the southern system that the Pennsylvania or commissioner form is the one generally adopted.[6] That is, the county authority usually consists of three commissioners elected by the people of the county. There are, however, exceptions to this rule. Thus the New York form of the county authority has been adopted in Virginia. There we find a board of supervisors, each member of which is

[1] *E. g.*, South and North Carolina and Georgia, *Ibid.*
[2] *Ibid.*, citing Code of Alabama, 1886, I., 221, 222.
[3] Howard, I., 237.
[4] *Ibid.*, 468.
[5] *Ibid.*, 469, 470, citing Code of North Carolina, 1883, pp. 287, 312.
[6] Howard, I., 468.

elected in one of the magisterial districts into which the county is divided. The attempt of northern men under the leadership of a New York man to introduce the New York town failed. The magisterial district established in 1874 has taken the place of the town which existed only for a few years. In this district a supervisor, constable, and overseer of the poor are elected by the people. There is, however, nothing like the town meeting.[1] Further the board of supervisors is not as independent as in New York, appeals going in many cases from its decisions to the county court, not only in points of law, but also on points of fact and questions of expediency. Powers in highway matters also are about equally divided between the board of supervisors and the county court. Assessments for the purposes of taxation are made by another popular authority, *viz.*, the commissioners of revenue, elected by popular vote.[2] The matter of education is under the control of the central government of the commonwealth, and quite a number of officers in the local administrative system are appointed either by the central government of the commonwealth or by the county court. This latter body has quite a wide range of administrative powers, among which are the powers to revise assessments, to determine election contests, *etc.*, *etc.*, and finally the most extraordinary power of removing county officers.[3] Another exception to the rule that the county authority in the south is a board of three commissioners is to be found in Georgia, where the ordinary, an officer who corresponds to the surrogate of the middle states, or the

[1] *Ibid.*, 231.

[2] *Ibid.*, 465–7, citing Code of Virginia, 1887.

[3] Howard, I., 466, 467.

probate judge of New England, and who is elected by the people of the county, is the most important county officer. In important matters he must act with the grand jury. The justices of the peace in Georgia also still have important duties to perform.[1]

In some of the southern commonwealths there is an area lower than the county which is sometimes called the town.[2] But it is not generally a corporation but simply an administrative district of the county, in which there is no town meeting. In it are elected by the people certain officers like commissioners of highways and constables, though generally such officers are appointed for such district by the county authority.

[1] Const., art. v., sec. 5, p. 2; Code, 1882, part I., title vi., chap. ii.; title v., chap. viii.

[2] See *supra*, p. 190, in relation to Alabama.

CHAPTER III.

MUNICIPAL ORGANIZATION IN THE UNITED STATES.

I.—History of the English municipality to the seventeenth and eighteenth centuries.[1]

1. *Origin of the borough.*—According to the English method of permitting the localities to participate in the work of administration the more thickly populated districts have always had a somewhat peculiar organization. The origin of this peculiar organization is to be found in the grant to districts with a greater than average population of a series of privileges for the exercise of which there was gradually formed a series of authorities differing in many respects from the authorities in the rural districts. These privileges were known as the *firma burgi* and the court leet.

The *firma burgi* was the lease of the town by the Crown to the inhabitants. From the very beginning of the Norman period the inhabitants of the towns, as well as of the rural districts, owed certain payments or services to the Crown. As a rule these payments were to be collected by the sheriff, as the fiscal representative of the Crown in the localities. In order to permit of the more easy collection of such payments, the Crown made contracts with the inhabitants of the town, in accordance with which they paid it a fixed sum, which they were permitted to raise among themselves

[1] See Gneist, *Selfgovernment, etc.*, 580–592.

in such manner as they saw fit. For the collection of this town *quota* there was provided an officer called the fermor or provost or mayor, who was to be selected as a rule by the inhabitants of the town, their selection being subject to the approval of the Norman exchequer, and who was to act under its supervision.

The court leet was a privilege granted to the inhabitants of special districts or to the lord of a given manor to hold a special police and judicial court when the inhabitants of the district were exempted from the jurisdiction of the ordinary court, to wit, the sheriff's tourn. This privilege was granted by the Crown generally, in the case of the towns, in return for a sum of money. Like the *firma burgi*, it soon came to be regarded as a right. The union of these two privileges constituted a municipal borough. The townsmen, meeting in court leet, found it a natural and easy matter to assume such other functions as were necessitated by the presence of a large number of persons in a small district. They established rules as to participation in the court leet and as to the election of the mayor or provost. The general rule was that no one should participate in the court leet who did not pay taxes, was not a householder, and was not in the eyes of the law capable of participating in the administration of justice. In the quaint language of the period, only those could be members of the court leet who were freemen householders, paying scot and bearing lot; and the formal criterion of the existence of these qualities in a given person was the fact that he had been sworn and enrolled in the court leet. This body had thus the ultimate decision as to the qualifications of municipal citizenship.

2. *Development of the municipal council.*—This originally simple and equitable organization was later completely changed through the acquisition by a large number of the boroughs of the right of representation in Parliament, which was formed in the time of Edward I (1295). The amount of the *quota* of the town was after the formation of Parliament fixed by that body, so that all that remained to be done by the town in the financial administration was to assess the *quota* assigned to it by Parliament. This business could be transacted better by a small committee of the townsmen than by the entire court leet or municipal assembly. At the same time that this influence was at work the whole judicial system was being completely changed by the introduction of judges learned in the law, by the formation of royal courts, and by the establishment of the office of justice of the peace, which was introduced into the urban as well as the rural districts. Through the formation of these authorities the court leet lost almost all its judicial functions, and was reduced to the position of a jury for the determination of the questions of fact rather than of law. This business could also be more easily attended to by a committee than by the entire court leet. The result was the formation of a committee of the original court leet or assembly of the municipal citizens for the transaction of both financial and judicial business. This committee gradually assumed the performance of all municipal business which had sprung up, such as the management of the property of the municipality, and finally was composed of the larger tax-payers—the most important men of the town, who often at the same time were granted by the Crown a commission of the peace, as a result of which

they became justices of the peace with the usual powers. In the larger boroughs they had not only the commission of the peace but also the right to hold a court of quarter sessions for the city with the usual powers. The larger tax-payers got these extensive powers simply as a result of the fact that the smaller tax-payers did not avail themselves of their privileges. The old basis of municipal rights, *i. e.*, the paying scot and bearing lot was undermined, and was replaced by different principles, varying in accordance with the social and economical conditions of the various boroughs. In those boroughs or cities which, like London, had great commercial and manufacturing interests membership in one of the guilds or mercantile companies became the basis of the right to discharge municipal functions. Thus was formed the town council or leet jury or capital burgesses, as the new municipal authority composed of the important men of the town was called, which, whatever the name that was given to it, was generally renewed by co-optation. The result was that in the fifteenth century in the towns as well as in the open country the government was administered by the gentry, the gentry in the towns being composed of the persons who had become rich in commerce and trade.

3. *Period of incorporation.*—Soon after this definite form of municipal organization was reached, in accordance with which the town was controlled by a council of rich men chosen by co-optation, the period of municipal charters begins and the charters incorporated not the inhabitants of the town, but the council which controlled the affairs of the town. The only purpose of these charters was to give to these districts the right to hold property and to sue and be sued. They had

no special political significance, they did not grant any new governmental powers to the town authorities. The desire of the Crown to control, through the representation in Parliament granted to the municipal boroughs, the composition of Parliament led the Crown to make most improvident grants of municipal charters carrying with them parliamentary representation, with the result that the municipal population had for a long time more than its fair share of representation in Parliament. As the grant of such charters would not have served the purpose of the king if he were not able to control the municipal elections, the king strove so far as he could to put all municipal powers into a few hands. The courts, therefore, which were dependent upon the Crown, held that any custom which provided for the control of the municipal administration by the narrow town council was in accordance with public policy and valid.[1] Further, in the early part of the reigns of the Stuarts the *quo warranto* was issued in many cases (81) to municipal corporations in order to forfeit their charters for irregularities and illegal actions, and on the adverse decision of the courts, new and less liberal charters were granted. Many corporations, alarmed at the action of the Crown and the courts, surrendered their charters and received new charters of a much less liberal character. All this was done to enable the Crown to control the action of the boroughs in their election of members of Parliament.[2] The result was that the municipal organization was so formed

[1] See the case of corporations decided in the time of Elizabeth, Dillon, *op. cit.*, I., 18; and Ireland v. Free Borough, 12, Co., 120.

[2] See Dillon, *op. cit.*, I., 18; Allinson and Penrose, *Philadelphia*, 10; Rex v. London, 8 How. St. Tr., 1039, 1340.

and its powers so prostituted as almost entirely to destroy its usefulness for administrative purposes. When, after the revolution of 1688, the nobles and gentry got the control of the government the case was the same, the only difference being that the nobles instead of the Crown made use of the municipal organization in order to control the composition of Parliament. Not only was the condition of the municipalities an extremely bad one, but all hopes of reform were vain so long as either the Crown or the nobles controlled the government. For the composition of Parliament was too valuable a power to be given up voluntarily by its holders.

So long as the municipal organization was so defective, it was useless to expect that the new functions of municipal administration, the adoption of which was necessitated by the increase of population in the cities, would be put into the hands of notoriously corrupt and unrepresentative municipal authorities. When the parish administration grew up in the time of the Tudors it was therefore extended into the cities as well as into the rural districts. In this way the poor-law was administered not by the borough council but by the parish authorities which acted under the continual supervision of the justices of the peace. As it became necessary to make some provision for the lighting and paving of the streets, the course adopted for the satisfaction of these needs was the same. Either these matters were entrusted to the parishes or special trusts or commissions were formed for their care by local and special legislation in particular cities, and the inhabitants were forced to contribute to the expenses of these branches.[1]

[1] Gneist, *Selfgovernment, etc.*, 595.

Such was the condition of the English municipality at the time that America was colonized. The strictly municipal affairs, which were mainly such matters as the care of the city property, the issue of local police ordinances and a certain power in the administration of justice,[1] were attended to by the municipal council or by its members in their capacity as justices of the peace; and this council was chosen generally by co-optation. This body did not attend to all matters affecting the welfare of the city since many of these were entrusted to the parishes and other special authorities and had almost no functions to discharge which related to the general administration of the country. The form of the municipal council was the same as it had been during the middle ages. It was composed generally of the mayor, recorder, aldermen, and councilmen.

II.—History of the American municipality.

1. *The original American municipality.*—Just as the English system of rural local government was made the model on which the original system of American rural local administration was formed, so the form of the municipal administration, as it existed in England in the seventeenth century, was made the model of the original system of American municipal administration.

In the first place a special organization was provided from the beginning for most of the cities in the colonies. Only one city, to wit, Boston, was ever governed in the same way as the rural towns.[2] New York and Philadelphia have, from the beginning

[1] On account of the fact that in most cases a special commission of the peace was issued to the cities.

[2] *Johns Hopkins University Studies in Historical and Political Science*, V., 79.

of their history as English possessions, had charters or forms of organization which differed considerably from the organization of the surrounding rural districts. The original form granted by these charters also resembled very closely the English municipal organization of the same period.[1] The city authority was the town council, composed of the mayor, recorder, aldermen, and assistants or councilmen. In this body was centred the entire municipal business. The administrative powers were not, however, so large as they are now. Like the English municipal corporation, the original American municipal corporation was mainly an organization for the satisfaction of purely local needs, *i. e.* for the management of the local property and finances and the issue of local police ordinances. Certain of the officers of the corporation, however, discharged a series of judicial and police functions as was the case in the English municipality. Thus in both New York and Philadelphia, the mayor, recorder, and aldermen were the municipal justices of the peace and judges.[2] The affairs of the general administration of the colony were attended to in the municipality by officers similar to the regular officers in the counties and rural districts.[3]

[1] For New York, see the Dongan Charter of 1686 and the Montgomerie Charter of 1730, to be found in Kent's *Commentary on the City Charter* and Ash, *Consolidated Act*; for Philadelphia, see Penn's Charter, J. H. U. S., V., 15.

[2] For New York, Charter of 1730, secs. 23, 26, 27, and 31. All the present local courts in New York City with the exception, of course, of the supreme court, are simply outgrowths of the original judicial powers of the mayor, recorder, and aldermen. The recorder has also become an almost exclusively judicial officer. For Philadelphia, J. H. U. S., V., 19 and 29.

[3] *E. g.*, for the administration of the poor-law there were the regular overseers of the poor elected in the wards of the city and the expenses of this branch of administration were defrayed by the church parishes. See Black, "The History of the Municipal Ownership of Land on Manhattan Island," in *Studies in History, etc.*, edited by the University Faculty of Political Science of Columbia College,

One of the results of this purely local character of the American municipality was that the town council had no power to tax in order to provide for the expenses of the local services. It was not regarded as a sufficiently governmental authority to be endowed with this attribute of sovereignty.[1] A New York law of 1787 (chapter 62) provided that the mayor, recorder, and aldermen, as the board of supervisors of the county of New York, were to levy the taxes demanded by the central government of the commonwealth of the inhabitants of the city as inhabitants of the commonwealth, the principle of the *firma burgi* having long ago been forgotten. The city council in New York, with the exception of the mayor and recorder, who were appointed by the governor and council, were by the charter to be elected by the freemen of the city, being inhabitants and the freeholders of each of the wards into which the city for the purposes of administration was divided. The freedom of the city was given by the mayor and four or more aldermen in common council, generally in return for the payment of money; and, besides giving in the proper cases the right to vote, was the only authorization to pursue certain trades within the confines of the city.[2] In Philadelphia the council was, as was so common in England at the time, elected by co-optation.[3] Finally the city corporation was, as in England, regarded as consisting of the city officers, *i. e.* the council, or the council and the freemen.[4]

I., 182; also J. H. U. S., V., 27. For the collection of the central colonial tax the New York Charter provided for the election of assessors similar to the town assessors. See Charter of 1730, sec. 3.

[1] See Black, *op. cit.*, 181; J. H. U. S., V., 22.

[2] See Kent's Charter, note 35. [3] See Allinson and Penrose, *op. cit.*, 9.

[4] So in Philadelphia. See Allinson and Penrose, *loc. cit.*

Such was the original position and organization of the American municipality. Since the beginning of its history the American municipality has developed in two directions. In the first place the position of the municipality and the duties to be attended to by its officers have greatly changed.

2. *Change in the position of the municipality.*—The legislature of the commonwealth has, to a large extent, lost sight of the original purpose of the municipality and has come to regard it as an organ of the central government for the purposes of the general commonwealth administration, making little distinction between central and municipal matters, and exercising over it much the same control which it exercises over counties and towns. Some of the cases in the courts claim for the legislature practically the same powers over the city and its property as the legislature possesses over the counties and towns which, as has been shown, are regarded as mere administrative districts for the purposes of general commonwealth administration.[1] Practically the only point where it is generally recognized that the legislative control over municipalities is not so great as over the *quasi* municipal corporations, such as counties and towns, is in the case of the private property of the municipality, of which, it has sometimes been held, the legislature may not deprive the municipality as it may deprive it of its public property.[2] One result of the more public character which is assigned to the municipalities by the American law and development is that the corporation is no longer regarded as

[1] See Darlington v. New York, 31 N. Y., 164; U. S. v. B. & O. R. R. Co., 17 Wallace, 322.

[2] Dillon, *op. cit.*, I., 110 *et seq.*, and cases cited.

consisting of the officers, but consists of all the people residing within the municipal district, while municipal suffrage is in most cases the same as commonwealth suffrage.[1] Further, the commonwealth makes use very frequently of the municipality or its officers as agents for the purposes of commonwealth administration. Thus in financial matters, the city, when of large size, is often made the agent of the commonwealth administration for the assessment and collection of taxes; indeed the city itself is often practically the tax-payer of certain of the commonwealth taxes, *e. g.*, the general property tax,[2] which it is then to collect of the owners of property. Further in many cases, where the city has not been made directly the agent of the central commonwealth administration, in that it itself through its officers is to attend to certain matters of general interest, the expense of a long series of matters is often devolved upon the city. This is particularly true of the matter of education.[3] The board of education, which has control of the educational administration within the limits of the city, and which is usually regarded as a separate *quasi* municipal corporation, is usually elected by the people residing within the district. In some cases, however, this body is appointed by the municipal authorities, as *e. g.* in New York and Brooklyn[4]; in others it is appointed by the legislature, as in Baltimore.[5] Finally municipal officers are often made use of for the purposes of general com-

[1] *Ibid.*, 70.

[2] It is to be noted, however, that the city has very generally been granted the local taxing power. *Ibid.*, 69. It is no longer compelled to defray its municipal expenses from the revenue of its property.

[3] *Cf.* Bryce, *American Commonwealth*, I., 599.

[4] N. Y. L. 1882, c. 410, sec. 1022; N. Y. L. 1888, ch. 5, title xvii., sec. 1.

[5] Bryce, *op. cit.*, I., 596, 599.

monwealth administration. Thus in most of the large cities municipal officers, either elected by the people of the city or appointed by the municipal authorities, are entrusted with the care of the public health and the support of the poor, attend to election matters, and have a series of duties to perform relative to the administration of judicial affairs, such as the making up of the jury lists.

In certain cases duties, which were in old times entrusted to the municipalities or their officers, have been assumed by the central commonwealth administration. Thus the preservation of the peace has in several of the large cities been put into the hands of a commission appointed by the central government of the commonwealth.[1] Further the courts of several of the commonwealths have held that the preservation of the peace is not a municipal function.[2]

What is true in exceptional cases of the preservation of the peace is almost universally true of the administration of justice, which is no longer regarded as a matter of local concern, but as a matter which should be attended to in accordance with a uniform system throughout the commonwealth. The courts which act at the present time in the various municipalities are not municipal but commonwealth courts. Their expenses may, it is true, be paid in large part by the

[1] This is so in Boston, where the care of the police is given to a board of police, appointed by the governor and council of the commonwealth. Mass. L. of 1885, c. 323. In Nebraska the boards of police and fire commissioners in cities of over 80,000 inhabitants are appointed by the governor. Compiled Statutes 1889, pp. 147,148. See for St. Louis, J. H. U. S., VII., 186. In Baltimore the board of police is appointed by the legislature of the commonwealth. See Allinson and Penrose, *Philadelphia*, 329.

[2] People v. Draper, 15 N. Y., 532; Baltimore v. Board of Police, 15. Md., 376.; People v. Mahaney, 13 Mich., 481.; *cf.* Dillon, *op. cit.*, I., 102.

municipalities in which they act, but the judges and their subordinate officers are not regarded as municipal officers.[1] An exception to this rule may be found in the case of the local tribunals called by different names, such as the mayor's court, the recorder's court, and the like.[2] These may be regarded as municipal courts when the judges who form them are elected by municipal electors or appointed by the municipal authorities, and when they have jurisdiction over municipal ordinances only. In some cities the aldermen still discharge judicial functions.

Further, the cities themselves have largely lost the power of regulating their own purely municipal affairs. For the central government of the commonwealth has decided, in many instances, to exercise its undoubted legal right to regulate even purely local affairs. Further, while at one time city charters were seldom changed or amended by the legislature without the consent of the city authorities or that of the people within the city, at the present time changes are made therein continually without even asking the opinion of the city. Many bills affecting the welfare of the cities are rushed through the legislature on the suggestion of the local member, who does not in all cases represent the desires or the true interests of the city. The American idea at the present time seems to be that the city does not any more than the county have the right to regulate its own local affairs; that the

[1] Dillon, *op. cit.*, I., 99, and cases cited. The action of the Civil-Service Commission in New York in classifying the officers in the courts as commonwealth rather than municipal officers shows what is the general opinion as to the character of the function of administering justice.—*Sixth Report of the New York Civil-Service Commission*, 448.

[2] Dillon, *op. cit.*, I., 492.

municipal authorities are largely the agents of the central commonwealth government, indeed that the city itself is simply an administrative district possessing, it is true, corporate powers, but possessing no sphere of action of its own in which it should decide for itself what it shall do and what it shall not do.[1] Few are the constitutional provisions which protect a city against the interference of the commonwealth legislature; and the legislatures of some of the commonwealths are too prone to take advantage of the unprotected position of the municipalities to interfere in matters which might be much better regulated by the municipalities themselves. The true sphere of the municipality as an organ for the satisfaction of local needs in accordance with the wishes of the inhabitants[2] is being in many cases overlooked, and the city is coming to be regarded, very much as the county, as simply an agency of the central commonwealth government.

3. *Change in the organization of the municipality.*— In the second place the old plan of consolidating all the administrative functions of the city corporation in the town council has been abandoned. There has very generally been made a clear distinction between the function of deliberation and the function of execution, the former being possessed by the council from

[1] See the case of U. S. v. The Baltimore and Ohio R.R. Co., 17 Wallace, 322, where the court says: "A municipal corporation . . . is a representative not only of the state, but is a portion of its governmental power. It is one of its creatures made for a specific purpose, to exercise within a limited sphere the powers of the state. The state may govern . . . the local territory as it governs the state at large. It may enlarge or contract its powers or destroy its existence."

[2] Dillon, *op. cit.*, I., 38.

which the mayor has been excluded, the latter being granted to the mayor and the various executive departments which have in the course of time been established.[1] This separation of the function of deliberation from that of execution was made in Philadelphia in 1789[2] and in New York in 1830.[3] The first charter of Boston, granted in 1822, however, permitted the mayor to be a member of the council.[4] Since 1830 most city charters have provided for this separation of the deliberative and executive functions.[5]

III.—The present organization of the American municipality.

1. *The mayor and the executive departments.*—When the mayor was first excluded from the council he was to be elected by the council.[6] In Philadelphia the mayor was elected by the council as late as 1839,[7] but in Boston by the very first charter the mayor was elected by the people of the city.[8] This seems to be the rule at the present time.[9] His term of office

[1] The recorder, it is to be noted, has become an almost exclusively judicial officer, though in some cases his functions show traces of his original position as a member of the council; *e. g.*, in the city of New York at the present time the recorder is a member of the sinking-fund commission, the reason being that he was a member of that commission before his position as a judicial officer had been determined. See Consolidation Act of 1882, c. 410, sec. 170.

[2] J. H. U. S., V., 34.

[3] L. 1830, c. 122, sec. 15.

[4] J. H. U. S., V., 96.

[5] See outline of the ordinary municipal charter in the United States given in Dillon, *op. cit.*, I., 68. In Chicago and San Francisco, however, the mayor at the present time sits in the council. Bryce, *American Commonwealth*, I., 595, note 5; Dillon says, *op. cit.*, I., 291, that "the mayor is frequently declared to be a member of the council."

[6] *E. g.*, see N. Y. Const. of 1821, art. 4, sec. 10.

[7] J. H. U. S., V., 34.

[8] *Ibid.*, 96.

[9] In New York this was provided in 1834; L. 1834, c. 23; in Philadelphia in 1839, J. H. U. S., V., 35; *cf.* Dillon, *op. cit.*, I., 69; Bryce, *op. cit.*, I., 594.

varies from one year in Boston to four years in Philadelphia.[1]

The ordinary charter provides that the mayor shall be the chief executive of the city. But this really means nothing more than the same phrase with reference to the President or the governor. That is, few if any powers are to be assumed as existing in the mayor as the result of the existence of such a provision in the charter. The only power which can be derived from it is that the mayor is to execute the laws within the city, which in its turn really means little more than that he is to "provide for the public peace, quell riots, and if necessary call out the militia,"[2] though this duty is primarily that of the sheriff as the chief conservator of the peace of the county.

While originally, and even after the grant to the mayor of the executive functions in the city government, the mayor had little power of appointing the various city officers, the whole tendency of American municipal development has been to increase this power of appointment. Originally there were no city executive departments such as are now to be found in such numbers in all large American cities, but the administrative matters of the cities were attended to in their details by committees of the council, which itself had the appointment of most of the subordinate officers, and could arrange and distribute the municipal business as it saw fit. Later the council formed, often by ordinance, separate executive departments. Thus, in New York, the charter of 1830 provided that the executive business should be attended to by depart-

[1] J. H. U. S., V., 117; Pa. Law, June 1st, 1885, art. 1, sec. 1.
[2] Bryce, *op. cit.*, I., 595.

ments which were to be organized, and whose heads were to be appointed by the common council.[1] The same power was possessed by the council of Philadelphia, and that of Boston.[2] But soon after the council lost the power of electing the mayor, it lost also in many cases the power of organizing the city executive departments and of designating their heads.[3]

Where the organizing power has been lost, it has been lost through the fact that many departments have been organized by statutes of the legislature. For the general rule of law is that what has been fixed by statute cannot be changed by ordinance.[4] In certain cases it would seem that the council still possesses the organizing power.[5] The taking away from the council of the power of designating the heads of the executive departments seems to have been a result of the movement which resulted so generally in the election of the mayor by the people of the city and of the heads of the commonwealth executive departments by the people of the commonwealth. This spirit of democratic government which was so strong at the middle of the century resulted also in the election of most of the heads of executive departments in the

[1] See also the Corporation Ordinances, revised 1845.

[2] J. H. U. S., V., 36 and 97.

[3] See, *e. g.*, N. Y. L., 1849, c. 187, sec. 20.

[4] *Cf.* Kearney v. Andrews, 2 Stockton, N. J., 70; White v. Tallman, 2 Dutch, N. J. 67.

[5] Thus in Boston, to a certain extent, J. H. U. S., V., 116 *et seq.*; St. Louis, *Ibid.*, 154; New Orleans, *Ibid.*, VII., 173. In New York the board of aldermen have still the power to make by ordinance, regulations other than those specially authorized by law "for fuller organization, perfecting, and carrying out the powers and duties prescribed to any department." Consolidated Act of 1882, c. 410, sec. 85. By common law finally the council has the right to create offices as incidental to its express powers. See Dillon, *op. cit.*, I., 290, and cases cited.

municipalities by the people of the municipality. This was the case in New York in 1846, and for quite a time thereafter, and is to a certain extent the case at the present time in the cities of Boston,[1] of St. Louis,[2] and of New Orleans.[3] Lately, however, there has been a reaction against this tendency. It has been believed of late that the mayor's powers should be increased, and that he should be in reality as well as in name the chief executive officer in the city government, and should have a large power of determining who shall be his subordinates. Therefore almost all the later charters have granted to the mayor a very large power of appointment. The only general exception to this rule that the heads of departments are appointed by the mayor is to be found in the case of the officer who has charge of the municipal finances, who is almost universally elected even now by the people of the city. This officer is called the comptroller or treasurer.[4] A further exception to the rule that the mayor appoints the heads of departments is often to be found in the case of the head of the department of public works, and in some instances in the case of the heads of other departments.[5] But though the tendency of the later charters is, as said, towards increasing the power of appointment of the mayor, still there are many city

[1] J. H. U. S., V., 116 *et seq.*

[2] *Ibid.*, 106, 171.

[3] *Ibid.*, VII., 173.

[4] For New York see L. 1884, c. 73; Philadelphia and St. Louis, J. H. U., S., V., 68, 171; New Orleans, *Ibid.*, VII., 173; Brooklyn and Chicago, Allinson and Penrose, *Philadelphia*, 298, 331. This is not, however, the case in Boston and Baltimore, where the mayor appoints the treasurer or comptroller. *Ibid.*, 329; J. H. U. S., V., 114, 123.

[5] This is especially true of Boston, St. Louis, and New Orleans, J. H. U. S., V., 118 *et seq.*; 170 *et seq.*; VII., 173.

charters which provide for the election by the people of the city of the heads of the executive departments. Where the mayor possesses the power of appointing the heads of executive departments, the general rule is that his appointments, to be valid, must receive the approval of the whole city council or one of its branches. Here, however, again the tendency of the later charters is to throw the entire responsibility for filling the office of head of executive department upon the mayor, who is not obliged to get his appointment confirmed by the city council. This is true in New York, Brooklyn, and Philadelphia.[1]

This increase in the power of appointment of the mayor has in some cases been accompanied by the grant to him of the power of removal. Of the larger cities Philadelphia and Boston give to the mayor absolute power of removing officers whom he appoints[2]; but in most of the cities the removal of an officer is conditioned upon obtaining the consent of the common council or a branch thereof.[3] A peculiar rule has been adopted in New York and Brooklyn. In New York the mayor may remove the heads of the executive departments, but only for cause, and subject to the confirmation of the governor of the commonwealth.[4] In Brooklyn the heads of departments are removed for cause by the courts on the application of the mayor.[5] It should be noticed, however, that in many cases

[1] N. Y. L. 1884, c. 43; N. Y. L. 1888, c. 583; Allinson and Penrose, *op. cit.*, 298, 329, 331. For Boston and St. Louis which require the confirmation of the council or a branch thereof, see J. H. U. S., V., 120 *et seq.*

[2] Pa. Law, June 1, 1885, art. 1, sec. 1; J. H. U. S., V., 117.

[3] St. Louis, where the same rule applies to the elected officers also, J. H. U. S., V., 156; Chicago, Allinson and Penrose, *op. cit.*, 331.

[4] N. Y. L. 1882, c. 410, sec. 108.

[5] N. Y. L. 1888, c. 583.

the terms of the heads of departments are not the same as that of the mayor, so that if he does not possess the power of removal, he may not, on coming into office, fill these positions as he may wish.[1] The charter of Brooklyn, however, recognizes that the coincidence of the terms of the heads of executive departments with that of the mayor is an important means of securing administrative harmony and efficiency.[2] As a general thing the city charters do not recognize in the mayor any power to direct the actions of the heads of departments, but where he possesses the absolute power of removal he must perforce practically possess such a power. As this power of removal is very slight in most cases, it cannot be said that the mayor possesses any large powers of directing the heads of departments how they shall perform their duties. Generally, however, the later charters do provide that the mayor may call on the heads of departments for reports as to the workings of their departments, and in several instances give the mayor the right to examine their accounts.[3]

In addition to these powers over the *personnel* of the city official service, the mayor often has powers relating to the several administrative services of a material rather than a personal character. Thus the mayor has, as a usual thing, the power to veto all the ordinances of the common council and in the case of ordinances making appropriations to veto the specific items which seem to him improper. This veto may be

[1] *E. g.* see St. Louis, Boston, J. H. U. S., V., 121–3, 156; New York, N. Y. L. 1882, c. 410, secs. 34–45.

[2] N. Y. L. 1888, c. 583; *cf.* Allinson and Penrose, *op. cit.*, 289.

[3] Phila., Pa., L. June 1, 1885, art. 1; N. Y. L. 1882, c. 410, secs. 110, 164.

overridden by a two-thirds vote of the council.[1] Finally in many cases the mayor is an *ex-officio* member of certain special boards which have been established to attend to certain matters affecting the city welfare.[2]

2. *The municipal council.*—The same lack of confidence in the council which has led to its disintegration and to the establishment of the mayor separate and apart from it with an increasingly greater number of powers over the executive official service of the city, has led in certain instances to a great decrease in the powers, regarded as distinctively deliberative in character, which, at the time of the attempted separation of the executive and deliberative functions, were reserved to the council. By the original charters and by the common law it was recognized that the city council, as the representative of the city corporation had a wide power of police ordinance.[3] This formerly wide-reaching ordinance power has been curtailed quite generally either by the fact that the legislature has itself fixed in detail the sanitary or other police regulations which shall be observed by the inhabitants of the city,[4] or has granted the ordinance power to the heads of the various executive departments of the city administration.[5]

Further the attempt has been made in some of the

[1] So in Boston, J. H. U. S., V., 117; St. Louis, *Ibid.*, 157; Philadelphia, Pa., Law, June 1, 1885; *cf.* Bryce, *op. cit.*, I., 595.

[2] See, *e. g.*, Philadelphia, Pa., Law, June 1, 1885, art. 1.

[3] See as to Boston, J. H. U. S., V., 119; as to Philadelphia and the Pennsylvania corporations, Wartman v. City, 33 Pa. St., 202, 209; Dillon, *op. cit.*, I., 392.

[4] *E. g.* see the case of New York City L. 1882, c. 410, secs. 86, 310, 330, 393, 440 *et passim*.

[5] *E. g.* take the cases of Boston, J. H. U. S., V., 121, 122, and St. Louis, *Ibid.*, 167.

larger cities of the commonwealth of New York to curtail very largely the power of the council over the finances of the city. While the original city corporation did not possess the taxing power for local matters, the devolution of the expenses of so many matters of central concern upon the cities, as well as the necessary assumption by the city corporation of so many new branches of administration, made necessary by the greater complexity of modern municipal life, has made it necessary to give to the city corporation the taxing power.[1] That is, the legislature designates the kind of taxes which the city may raise and leaves to the city authorities the fixing of their amount, in some cases, as *e. g.* in Boston, limiting the rate which may be levied.[2] The municipal authority which originally received the taxing power was the city council. This seems to be the rule at the present. But in New York and Brooklyn this did not seem to work satisfactorily, and the scheme has been devised of really limiting the amount of taxes which may be raised by the council by taking away from it the power of making the appropriations, for the purpose of paying which, resort has to be had to taxes. In these two cities the power of making the appropriations has been given to a board of executive officers, of whom the mayor is one, differently constituted in the different cities. In Brooklyn the council has the right to cut down but not to raise the appropriations made by this board; in New York the board of aldermen may not change them in any way.[3] In general, however, it is the council which

[1] Dillon, *op. cit.*, I., 69.

[2] J. H. U. S., V., 114.

[3] N. Y. L. 1888, c. 583, title ii., 18. N. Y. L. 1882, c. 410, sec. 189. See also Allinson and Penrose, *op. cit.*, 300.

has the power of making the appropriations necessary to carry on the city government. But it must be remembered that the tendency in all the commonwealths is for the legislature to enumerate in detail the objects for which municipal expenditure may be incurred. Sometimes this tendency is carried so far as to enumerate in statutes the salaries of many of the officers of the city government. Nothing is more common in some of the commonwealths than for the legislature to interfere to raise the salaries of certain of the city officers who have political "influence" without consulting the city authorities in any way.[1] Where the legislature has thus fixed in detail the work of the city and the salaries of its officers the power of appropriating money loses almost altogether its discretionary character and becomes little more than an arithmetical process, a purely ministerial act whose performance may be enforced by the courts on the application of any person interested in having the particular appropriation made.[2] An extreme example of this tendency to fix in detail the work of the city and the salaries of its officers by legislative enactment is to be found in the city of New York.[3] In Philadelphia, however the councils seem to have quite a large power over the appropriations,[4] and in all cities the authority for making the appropriations, generally the council, may provide for certain, though not for many, optional expenses whose amount also it has the power to fix.

[1] *Cf.* Pres. Seth Low in his chapter on "Municipal Government" in Bryce, *American Commonwealth*, I., 630.

[2] People *ex rel.* Wright v. Common Council of Buffalo, 16 Abbott's New Cases affirmed in 38 Hun N. Y., 637.

[3] See L. of 1882, c. 410, sec. 52 *et passim*.

[4] See an ordinance of the councils of date Dec. 30, 1886, cited in Allinson and Penrose, *op. cit.*, 359.

The form of the city council has been subjected to considerable change. In some cases it is formed, as originally, of a single body, as *e. g.* in New York, Brooklyn, and Chicago[1]; in others, of two chambers, as *e. g.* in Boston, Baltimore, St. Louis, and Philadelphia.[2] The members of the council, whether it consists of a single body or of two chambers, are elected by the people of the city, which is often differently districted for each chamber where the two-chamber system has been adopted. In one case, St. Louis, the members of the smaller chamber are elected on a general ticket.[3] In Brooklyn also a certain number of the aldermen are called aldermen at large and are elected by general ticket, though, when elected, they form part of the single chamber of which the council is composed.[4] In no instance do we find an instance of a self-perpetuating council, though this was the case in Philadelphia as under the old English system.[5] In one case we find minority representation. This is Chicago.[6] The term of office of the members of the council varies

[1] N. Y. L. 1882, c. 410, sec. 29; Allinson and Penrose, *op. cit.*, 331.

[2] J. H. U. S., V., 118, 157; Allinson and Penrose, *op. cit.*, 331.

[3] J. H. U. S., V., 157.

[4] N. Y. L. 1888, c. 583, title ii., 3.

[5] J. H. U. S., V., 15 *et seq.*

[6] Allinson and Penrose, *op. cit.*, 331. The authors of this book adduce New York as a place where the principle of minority representation has been adopted in the board of aldermen. This is a mistake, but a natural one. For the consolidated act provides for minority representation (sec. 29). This provision was taken from L. 1873, c. 335, sec. 4, as amended by L. 1878, c. 400, but is to be read in connection with Laws of 1882, c. 403, which provides for representation of the majority alone. The fact that the consolidated act bears a later date than that of the chapter of the laws of 1882 providing for majority representation does not affect the validity of chapter 403 of the laws of 1882, since the last section of the consolidated act provides that it shall be regarded as passed on January 1, 1882. Section 29 of the consolidated act is therefore amended by chapter 403 of the laws of 1882.

from one year as in New York,[1] to four years as in St. Louis.[2] Where the bicameral system has been adopted for the council the term of the members of the smaller chamber is often longer than that of the members of the larger chamber.[3] Generally the council is totally renewed at one time. But in some cases, as *e. g.* St. Louis,[4] one half only retire on the occasion of a council election.

As a general rule all the officers of the United States municipality are salaried, with the exception, in some cases, of the members of the council, and service is as a rule voluntary, though this was not originally the rule.[5] For the higher positions even, no special technical qualifications for office are provided as a general thing, but for the lower, especially in the case of the clerical service, the appointment is made often as a result of competitive examinations.[6] This is so in the commonwealths of New York and Massachusetts and the city of Philadelphia.[7]

The elections by which so many of the positions in the city service are filled are generally by universal suffrage. The only important exception to this rule is to be found in the case of those commonwealths which have made provision for registration laws. Such laws really provide an unlimited lodger suffrage with, however, a very short term of residence within the city,

[1] L. 1882, c. 410, sec. 29.

[2] J. H. U. S., V., 157.

[3] See, *e. g.*, the charter of St. Louis where the term of office of the members of the "council," as the smaller branch is called, is four years and that of the house of delegates is only two years. J. H. U. S., V., 157, 158.

[4] J. H. U. S., V., 85.

[5] *E. g.* see the early New York charters.

[6] See the proposal made by Pres. Eliot in *The Forum*, October, 1891.

[7] See *infra*, II., p. 35.

sometimes as low as one month, and seldom longer than six months. In one city, however, *viz.*, Philadelphia it is said that most of the voters are freeholders or rent payers. This would seem to be the result of the peculiar social conditions of the city.[1] The conditions of eligibility are generally the same as those for electors, though in one or two instances in order to be qualified for office it is necessary for the elector to be assessed at a certain amount for the purposes of taxation.[2]

IV.—The village or borough.

1. *General position.*—The city is not, however, the only municipality known to the American law. In many cases the needs of a locality, which may be a portion of one town or may lie in two towns, demand a different form of government from that offered in the ordinary town organization, while at the same time they do not demand so compact an organization as that to be found in a city. For the purpose of satisfying these demands the village or borough organization has been provided. In New England, where the people have been able to satisfy the demands made by thickly populated districts through the ordinary instrumentalities of the town, this embryonic municipal organization is said to be comparatively rare, though it is still to be

[1] See Allinson and Penrose, *op. cit.*, 297; Bryce, *op. cit.*, II., 360, note 2.

[2] Thus in Baltimore the members of the council must be assessed for at least $300. They must further be residents of the city for at least three years, and must be citizens of the United States. This last is so in Brooklyn also, N. Y. L. 1888, c. 583, title II., 3. Those of the smaller branch of the Baltimore council must be assessed at $500, be resident for four years, and be twenty-five years of age. Similar qualifications are required of the mayor. Allinson and Penrose, *op. cit.*, 329. In St. Louis every member of the council must be thirty years of age, a citizen of the commonwealth for five years, and a resident and freeholder in the city for one year. J. H. U. S., V., 157.

found, as *e. g.* in Connecticut and Vermont, which have probably been influenced by their nearness to New York. But in the middle commonwealths, and in the west and northwest, the village or borough organization is very common, so common indeed as very seriously to encroach upon the sphere of town government. For in almost all cases where the social conditions are such as to permit the adoption of the village organization (*i. e.*, where a comparatively large number of people live within a small area) we find that it is as a matter of fact adopted. Thus in New York the general law for the incorporation of villages provides that the village organization may be adopted where three hundred resident inhabitants are to found in a district of less than one square mile in extent.[1] The main difference between the town and the village is that, while the town is governed by the town meeting, *i. e.* the meeting of the political people of the town, the village is governed by a select body, to wit, the board of trustees or burgesses. Further, while the town is a *quasi* municipal corporation, the village or borough is a municipal corporation proper,[2] since it is formed primarily for the satisfaction of local needs. But, like the city, the village, though formed primarily for local needs, may be made use of by the commonwealth for the purposes of general administration. On the other hand, the village may practically be distinguished from the city from the fact that, on account of its small size, it is seldom as a matter of fact made an agent of general administration. About the only branch of general administration which is entrusted to the village is the preservation of the peace.

[1] See N. Y. L. 1870, c. 291, sec. 1.

[2] Dillon, *op. cit.*, I., 45.

2. *The village organization.*—The organization provided by the New York law for the incorporation of villages, to which reference has already been made, may be taken as an example of the village organization in the United States.

By this the village authority is a board of three or more trustees and a president who is a member of the board. By the side of the trustees are a treasurer, a clerk, a collector, and a street commissioner. The trustees, the president, the treasurer, and the collector are elected by the electors in the village. The trustees serve for two years, one half or the major part of the number retiring each year, while the other elected officers serve for one year. Residence in the village is a necessary qualification of eligibility for all offices, and the ownership of property to be assessed for the taxes made necessary by the expenditures of the village, is an additional qualification for the positions of president and trustee. The other officers are to be appointed annually by the board of trustees, who may also appoint fire and police officers and a sealer of weights and measures. None of the offices is obligatory; and the offices of president and trustee are unpaid.

The board of trustees has large powers relative to the official service of the village, having the powers to remove for misconduct and after a hearing, any officer whom they appoint (the shortness of the term of office makes a larger disciplinary power unnecessary), and, by regulation, to fix the powers and duties of all the village officers so far as this has not been done by the law, which is the case for the offices of president and treasurer and one or two others. Most of their other powers are economical in character relating to the

finances and local services of the village. They have the care of the village property, make contracts for the village, and audit all claims against it. In their management of the finances they are subjected to a popular control. For this purpose the expenditures of the village are divided into ordinary and extraordinary expenditures, the latter consisting generally of all expenditures of over $500 for any one specific object. The estimates for ordinary expenditures for the ensuing year are to be presented to the people at the annual election, who may then judge of the wisdom of the trustees' action before casting their votes, though they take no direct action upon the estimates. The extraordinary expenditures must, however, be voted by those electors who are liable to be assessed for the tax to defray them in their own right or in that of their wives. To pay the expenses of the village administration power is given to the trustees to levy a general property tax in about the usual way, and a poll tax of $1 on each male inhabitant between the ages of twenty-one and sixty years. No debts of a permanent character may be contracted with the exception that debts of not more than ten *per cent.* of the assessed value of taxable property in the village, may be incurred for the purpose of supplying the village with water.[1] The power to borrow money is, however, often granted by special and local legislation. Besides these powers of a financial character the trustees have quite an extensive power to issue local police ordinances which they may sanction with a penalty not exceeding $100; have care of the public health and have the ordinary powers of the town highway commissioners for the village district

[1] N. Y. L. 1875, c. 181.

which is taken out of the jurisdiction of the town highway commissioners. A later law[1] allows the trustees to provide for the election by the people in the larger villages of police justices with the same criminal jurisdiction, as that possessed by the town justices of the peace who are not to have jurisdiction within the village district. These police justices have also jurisdiction over violations of village ordinances, and in case of the non-payment of the penalty, which is to be sued for in an action for debt, may commit the violator to the county jail.

[1] N. Y. L. 1875, c. 514.

CHAPTER IV.

GENERAL CHARACTERISTICS OF LOCAL ADMINISTRATION IN THE UNITED STATES.

I.—Statutory enumeration of powers.

One of the most noticeable characteristics of the system of local administration in the United States is to be found in the fact that all matters relative to the organization of the local administrative system, all the powers of the various local districts considered as municipal corporations, and the duties of the officers acting within these districts are fixed in their most minute details by statute.[1] As no administration can long be carried on on the same general rules, and as the needs of different districts differ very much one from the other, it is necessary to give to some authority the power to change in its details the general plan of administration so as to suit changed conditions and varying needs. But as these minute details have been fixed by statute they can be changed only by statute. Therefore, the statute-making authority is being called upon all the time to act, in order that the administration of local affairs may be carried on to advantage. The general system is continually suffering modifications, and the various districts have, as a result of the intervention of the legislature, quite different powers.

[1] *Cf.* Dillon, *op. cit.*, I., 145.

Being accustomed to this continual interference by means of special and local legislation in the affairs of the localities, the legislature comes to think that these local affairs may best be regulated from the centre of the commonwealth, and often acts where it has not been asked to act by the local authorities or by the inhabitants of the localities. It often imposes burdens upon the localities which are unwise, and not infrequently allows itself to be made use of by unscrupulous persons or some political clique to forward their interests at the expense of the true interests of the locality directly concerned.[1] How far this habit of special and local legislation is carried is seen on examining the session laws of New York for the year 1886, a year which has been chosen simply at random. Of the 681 acts passed that year by the legislature, 280, *i. e.* between one third and one half of the entire work of the legislature, interfered directly with the affairs of some particular county, city, village, or town which was mentioned by name in the act. The results of this custom of special and local legislation are:

1. *The centralization of local matters in the hands of an irresponsible central authority.*—So few matters relating to the localities are fixed by the constitution that the power of the legislature over the localities is supreme. Almost the only thing which the legislature cannot do is to take away from the localities their privilege of electing their own officers. This is provided for in the constitutions of several of the commonwealths and is therefore beyond the power

[1] President Seth Low says in his chapter on Municipal Government contained in Bryce, *American Commonwealth*, I., 630, that in the commonwealth of New York "the habit of interference in city action has become to the legislature almost a second nature."

of the legislature.[1] The force of such provisions is often, however, destroyed by the interpretation put upon them by the courts. Thus in New York the court of appeals decided in the case of *People v. Draper*[2] that the appointment of police commissioners by the governor and senate in accordance with a statute of the legislature was not in conflict with the constitution, because such officers were not local but commonwealth officers.[3] The same court held later[4] that fire and health officers might also be appointed by the governor because these officers were not only public commonwealth officers, but were also new officers, *i. e.* were not in existence at the time of the adoption of the constitution, and were therefore not subject to its provisions. This distinction between old and new officers first made in these cases was carried to the bounds of the absurd in the case of *Astor v. The Mayor*,[5] which permitted the transfer of old functions, performed by old municipal officers, to new officers who might constitutionally be regarded as public and not local officers, and might be appointed by the governor. The result of this line of decisions has been to deprive the cities of New York, and particularly the city of New York, of the right of local self-administration which, it was supposed, was guaranteed by the constitution of the commonwealth. Thus at one time there was to be seen in the city of New York, attend-

[1] *E. g.* see constitution of New York, art. 10, sec. 2. *Cf.* Dillon, *op. cit.*, I., 100.

[2] 15 N. Y., 532.

[3] See *supra*, p. 204 for other decisions of a similar tenor.

[4] People v. Pinckney, 32 N. Y., 377, and Metropolitan Board of Health v. Heister, 37 N. Y., 661.

[5] 62 N. Y., 567.

ing to a work which has been held by the highest court of the commonwealth to be a purely municipal undertaking,[1] *viz.* the aqueduct, a commission whose members were for the most part appointed by the central government of the commonwealth and not by the authorities of the city which alone is interested.[2] On this commission provision was made[3] for only one representative of the city which was paying for the work, and which was primarily if not alone interested therein, to wit, the municipal commissioner of public works. This same legislative interference in municipal matters has been characteristic of the action of the legislature with regard to the providing of means of rapid transit for the city. The court of appeals in one of its decisions gives evidence of its belief in the dangers resulting from this line of decisions. This is the case of *People v. Albertson*,[4] where it distinctly says that the purpose of article 10, section 2, of the New York constitution was to secure the right of local government to the civil divisions of the commonwealth and that this right could not be taken away from them by the legislature. But the majority of its decisions would seem to be in the direction of permitting the legislature to centralize as much as it saw fit the administration of the commonwealth. That these decisions are impolitic and unwise no one will deny. That legally they were in some cases unnecessary is to be seen when they are compared with the decisions of the courts of other commonwealths. Thus in Michigan

[1] Bailey v. The Mayor, 3 Hill, 531; People v. Civil-Service Boards, 103 N. Y., 657.

[2] N. Y. L. of 1883, c. 490; N. Y. L. of 1886, c. 337.

[3] N. Y. L. 1886, c. 337.

[4] 55 N. Y., 50.

and Indiana a similar constitutional provision has been interpreted as preventing the legislature from granting to the governor the power to appoint municipal commissioners of public works,[1] or itself to appoint park commissioners and force the city to provide a park.[2]

This tendency towards a legislative centralization, which is to be seen also in commonwealths other than New York, has led in some of them to the insertion in the constitution of provisions which aim at giving the local areas a greater independence of the legislature, at fixing by the law in the constitution of many matters of local administration, or at assuring to the localities the right to regulate within the law their own affairs free from all legislative interference.[3]

2. *Local variations.*—A further result of this habit of special and local legislation is a great lack of uniformity in the administrative system of even a single commonwealth, especially in a commonwealth like New York, where the constitutional provisions ensuring the independence of the local corporations are of comparatively little importance. Such a lack of uniformity is not of course a serious defect; indeed it has the advantage of not sacrificing local interests to the fetish of uniformity and symmetry. It does of course add very greatly to the difficulties of both the student and the practising lawyer since search for special statutes must always be made to find out what are the actual powers of any particular district, it being unsafe to place much dependence on general statutes. This

[1] People v. Hurlburt, 24 Mich., 44; *Cf.* State v. Denny, 118 Indiana, 449; Evansville v. State, *Ibid.*, 426.

[2] People v. Detroit, 28 Mich., 228.

[3] *Cf.* Stimson, *American Statute Law*, pp. 94, 95.

local and special legislation is apt to result in conflicting legislation also.

3. *No local independence.*—The possession by the legislature of this right of control over the affairs of the local areas and the readiness which the legislature has ever shown to exercise this right have brought it about finally, that it is almost impossible to distinguish the sphere of central from the sphere of local action. The officers acting in the local areas and elected by the people of the localities are for the most part, notwithstanding the juristic personality which has been recognized as belonging to the localities, mere agents of the central administration of the commonwealth, and the entire administrative system in the localities may be changed at will by the legislature.[1]

II.—Administrative independence of the local authorities.

1. *Absence of central administrative control.*—The second general characteristic of the American system of local administration is to be found in the great number of the authorities and their independence both of each other and of the central administration of the commonwealth. The great number of the authorities is due to the fact that the administration is not professional in character.[2] Their independence is due to the decentralized character of the administrative system adopted in the commonwealths. The rule is, that, notwithstanding most of the authorities in the local areas attend to a great deal of work which interests the commonwealth as a whole, they shall still be elected by the people of the localities in which they act, and when

[1] *Cf.* Lorillard v. Town of Monroe, 11 N. Y., 392; United States v. the Baltimore and Ohio R. R. Co., 17 Wallace, 322.

[2] *Infra*, II., p. 7.

elected shall act free from almost all central administrative control. Seldom do we find that any administrative authority has the power to direct them how they shall perform their duties or to quash or amend their action or to exercise any disciplinary power over them. In a few instances, however, where the action of the authorities in the localities may have a disastrous effect upon the general administration of the commonwealth in matters where it is particularly desirable that the administration shall be conducted in accordance with a uniform plan and where local action may produce inequalities in the burden of commonwealth taxation, resort has been had to a central administrative control which, however, up to the present time has not been thoroughly worked out. Thus in New York the governor has disciplinary powers of a limited character over a number of officers acting in the localities among whom may be mentioned the sheriff, the district attorney, and the superintendent of the poor.[1] The county treasurer who is the fiscal agent both of the county and of the commonwealth was formerly removable in the same way. Such powers seem, however, to be exceptional. In New York also in the sanitary administration the state board of health has a series of supervisory powers over the actions of the local boards of health.[2] In the administration of public education the commonwealth superintendent of public instruction has similar and even larger powers of administrative supervision over everything connected with the common schools.[3] Such a central administra-

[1] *Supra*, p. 79.

[2] Public Health Act of 1885, c. 270, secs. 3, 5, and 8.

[3] School Law of 1864, Title I., sec. 18; Title XII.

tive control in educational matters seems to be quite common. Finally in the tax administration provision is often made for the equalization of assessment valuations both for the county and for the commonwealth, in order to prevent the assessors in one town or county from assessing the property subject to taxation in that town or county at such a low rate of valuation as to throw part of the town's share of commonwealth or county taxation upon the other towns.[1] But these instances of the administrative control are quite rare.

2. *Decentralized character of the local organizations.* —Not only is the central administrative control over the actions of the officers in the localities very weak, but the administration in any given district is not at all concentrated. Seldom do we find any authority which has administrative supervision of any extent over the actions of the other authorities in the locality. A reference to the powers of the county authority, *i. e.* the supervisors or the commissioners, will show how few are their powers of administrative control.[2] The only possible exception to this general independence of the local authorities from the other local authorities is to be found in the case of the municipal administration, where the organization is considerably more concentrated. It has been pointed out that the tendency of modern American municipal development is to concentrate the municipal administration still more and to increase very largely the powers of the mayor.[3] But as a general thing even now the various municipal officers are comparatively independent of the mayor,

[1] See Cooley on *Taxation*, 2d Ed., 421–423, 747–749.
[2] *Supra*, pp. 178–192.
[3] *Supra*, p. 210.

though they are somewhat more dependent upon the mayor and the city council acting together. The general characteristic of the American system of local administration is that it is from the administrative point of view extremely decentralized. The administrative control, both central and local, is believed to be unnecessary because of the detailed enumeration in the statutes of all the powers of the local corporations, and of the officers in the local areas. Everything is so fully regulated by the legislature that there is little room left for administrative instructions to be sent either by the central authorities of the commonwealth or any superior local authority. In order to ensure that officers will perform the duties imposed upon them by the statutes resort has been had to the sanctions of the criminal law. To the violation of almost every official duty is attached a criminal penalty which is to be enforced by the ordinary criminal courts. Detailed enumeration of official duties in the statutes and punishment of the violation of official duties by the criminal courts are thought to be sufficient to ensure efficient and impartial administration and to obviate the necessity of forming any strong administrative control.[1]

III.—Non-professional character of the system.

The third general characteristic of the American system of local administration, as indeed of the entire American system of administration, is to be found in the non-professional character of the officers. We find almost no professional officers. Almost all are non-professional in character. That is, as a rule the officers receive no salary but only *per diem* allowances,

[1] *Infra*, II., pp. 80, 88.

which are seldom greater than the wages received by a skilled laborer, serve for short terms of office, and, after filling their term of office, return again to the ranks of society from which they came. Having no opportunity to develop professional habits they thus do not form a special class in the community. The result of such a system of official organization is that society governs itself, whence the name that is given to the system, *viz.*, that of self-government, which means a system of government and administration in which society governs itself through the organization of the state. In such a system the state delegates certain specific powers to officers appointed by society in its local organizations—officers who on account of the shortness of their terms of office do not cease to have all the feelings of society. The only exception to this rule of the non-professional character of the officers in the local administrative system is to be found in the cities, where the necessities of municipal administration seem to call for quite a number of professional officers, who are generally salaried and serve for longer terms.

Service as officer is not only unpaid but it is often obligatory. There are at the present time more exceptions to this rule of the obligatory character of the service than in former years, and indeed the obligation itself seems to be disappearing. By the original English system, however, service as administrative officer was really obligatory in almost all cases, just as much as service on a jury or in the army, but at the present time the tendency would seem to be towards voluntaryism. In New York many of the local offices were until recently obligatory, refusal to serve being punish-

able with a fine of $50. This was true of most of the town offices, *e. g.* supervisor, town clerk, assessor, commissioner of highways, and overseer of the poor,[1] but the obligation to serve seems to have been omitted in the revision of the law made in 1890.[2]

[1] See New York Revised Statutes, Part I., Chap. XI., Title III., art. 2d., sections 25 and 26; *cf.* State v. Ferguson, 31 N. J. L., 107.

[2] L. 1890, c. 569.

CHAPTER V.

LOCAL ADMINISTRATION IN ENGLAND.

I.—History from the seventeenth century to the present time.

1. *Defects of the old system.*—The history of the English system of local administration up to the beginning of the seventeenth century has already been traced.[1] It has been shown how the original prefectoral administration of the sheriffs was gradually replaced by the administration of the justices of the peace, who practically had within their hands the entire control of administrative matters in the localities and from whom were recruited to a large extent the members of Parliament. This system, it has been pointed out, was really one of great local self-government. It was not, however, in the modern sense representative in character; and when, in 1830, its financial side became more important on account of the great increase in the amount of local taxes through the increase of the poor-rates, it was thought that some voice as to the amount of these local taxes should be given to the taxpayers. The change in feeling was due in large part also to social changes. The application of steam power to manufactures and the very general introduction of machinery revolutionized industrial methods, massed

[1] *Supra*, pp. 162–165.

large populations in the cities, and gave to the possessors of personal property, that is the commercial and industrial classes, an importance they never had before. This change in the relative importance and power of the property-owning classes led first to a change in the representation in Parliament—a change which was brought about by the celebrated reform bill of 1832. By this act the balance of political power was taken away from the nobility and gentry and given to the middle classes. As the system of local administration of that time gave most of the power in the localities to the nobility and the gentry, it was only natural that the new political masters should seek to discover and adopt some plan of administering local affairs by means of which their local influence might be increased.

Another reason for the change which soon followed was the necessity of wide-reaching reforms. The deplorable condition of the municipal administration has already been alluded to.[1] The power exercised at first by the Crown and later by the nobility over the municipal elections, in order thereby to control the representation in Parliament, had been used in such a way that the municipal organization and institutions were utterly incapable of any sort of even passable administration. Further the poor-rates had increased to such an enormous sum in the years immediately preceding 1832 and the anxiety of the local authorities everywhere to throw the burden of supporting the poor on some other locality than their own had led to a complicated law of settlement which was totally at variance with the needs of an advancing industrial society. But

[1] *Supra*, p. 198.

the necessary reforms could only be realized by the establishment of a uniform system of administration. This implied a central control such as had not before existed. In theory the justices of the peace were subject to the guidance of the central government, and the central government could in theory dismiss them from office if they disobeyed its instructions. But the high social and political position of the justices made it a delicate matter for the central government to send instructions to them; and even if such instructions were sent it was extremely difficult to enforce them. The threat of dismissal from office had no terrors for the average justice of the peace. Dismissal meant relief from arduous service, and involved no pecuniary loss, since the justices received no pay. Hence the dismissal of a justice of the peace is rarely met with in later English history; and the power to send the justices instructions became finally an empty prerogative.[1]

2. *The reforms of 1834 and 1835.*—For these reasons some of the first resolutions passed by the new Parliament, formed as a result of the reform bill, provided for a thorough investigation of the administration of the poor-law and of municipal government. In 1833 the celebrated poor-law commission was appointed and began its work. The result of this work was published in 1834, and has been described as "perhaps the most remarkable and startling document to be found in the whole range of English, perhaps, indeed,

[1] The last attempt to coerce justices of the peace through the power of dismissal from office was made in the reign of William III by Lord Somers and created such a storm that no subsequent ministry has dared to repeat it. Gneist, *Das Englische Verwaltungsrecht*, 1884, p. 389.

of all, social history."[1] The plans of reform advocated in this report and finally adopted in the Poor-Law Amendment Act of 1834 involved the formation of a system of local administration which should be representative of the local tax-payers, and at the same time subject to central administrative control. The parishes on which had been devolved the burden of supporting the poor under the old system were grouped into unions. In each union there was formed a board of poor-law guardians, to be elected by the inhabitants of the union. Service as guardian was not obligatory as had been service in most of the positions under the old system. This board confined itself practically to deciding the amount of money to be spent while the actual detailed administrative work, formerly attended to by the unpaid overseers of the poor and the justices of the peace, was now to be attended to by salaried subordinates devoting their whole time to the work. That is the actual poor-relief was to be distributed mainly by a salaried relieving officer. This board and all its officers were subject to a most strict central administrative control exercised by the central poor-law board at London. There were several reasons for the introduction of this control. In the first place it was felt that some method must be devised to restrain the local selfishness which had been one of the greatest evils of the old system. If under the new system a locality showed a desire to escape any of the burdens that were imposed upon it by the law, the central control could hold it up to the performance of its duties. In the second place the new system did not offer the same guaranties as the old for the integrity and intel-

[1] Fowle, *The Poor-Law*, 1881, p. 75.

ligence of its officers. Under the old system as a rule, the justices of the peace—the most prominent men in the county—either did the work themselves, or had it done under their personal direction; under the new system the detailed administrative work was to be attended to by salaried subordinates of the boards of guardians. A central control was necessary finally because of the necessity of uniform administration.

As the needs of English society have increased, new administrative agencies have been demanded and devised for their satisfaction; and these new agencies have been organized on the same lines as the organs for the poor-law administration. Finally the county has been reorganized on somewhat the same plan. At about the same time that the poor-law administration was being investigated the municipal administration also was being studied with the purpose of devising some plan of reform which should do away with existing defects and make the municipal organization an efficient instrument for municipal administration. The result of the report of the commission appointed for this purpose was the Municipal Corporations Act of 1835, which introduced a uniform law for the organization of the municipal corporations of the kingdom and abolished most of the abuses of the previously existing charters. The form of organization adopted for the municipal boroughs has since been adopted for the county organization by the Local-Government Act of 1888.

As a result of these changes the justices of the peace have lost much of their importance. Most of their administrative functions have been taken from them, and given to special administrative officers

established by the reform legislation. They have, however, retained most of their judicial functions, which have really, somewhat as in the United States, been increased.

3. *Present position of the justices of the peace.*—The long-continued failure of the English law to make any clear distinction between justice and administration has brought it about that, notwithstanding the recent attempts to separate these two classes of functions, the justices of the peace still have under the present system, as indeed they also have in the United States, a series of duties which are, from the continental point of view at any rate, administrative in character.[1] They are thus still conservators of the peace and as such have the right to bind over all disorderly persons to keep the peace. They act as the preliminary investigators of all crimes, even of felonies. Acting either singly or in petty or special sessions they convict of petty offences, commonly without a jury.[2] In the courts of quarter sessions, when all the justices of the peace of the county meet together, they form when acting with a jury the lowest criminal court, and without a jury an administrative court of appeal from the orders and convictions of the justices acting singly or in petty and special sessions.[3] Certain of these functions have at the same time the characteristics of judicial and administrative action, that is the matters dealt with are frequently administrative in character, while it may be impossible to distinguish them in form from judicial acts. For

[1] *Cf.* Wigram, *The Justices' Note-Book*, Chap. I.; Anson, *op. cit.*, II., 237.

[2] Stone, *Practice of Justices of the Peace at Petty and Special Sessions*, 9th edition, Part I.

[3] Smith, *Practice at Quarter Sessions* 1882, p. 4; *infra*, II., p. 214.

English administrative law is highly specialized; its rules are put into the form of direct commands to the people to do or not to do particular things. These commands are sanctioned by criminal penalties, and the imposition of these penalties is entrusted to the justices of the peace acting as police judges.[1] The result of this specialization of the English law has been an enormous extension of the police powers of the justices of the peace even under the present system. In the cities, however, the tendency is for the justices, both in England and in the United States, to give way to stipendiary magistrates and salaried recorders.[2]

Besides these cases in which the action of the justices of the peace is judicial in form but often administrative in effect, there is a further class of cases in which their action is more obviously administrative. Not all the laws whose execution is entrusted to the justices of the peace can be reduced to the form of simple commands addressed to the people at large. Certain matters have to be left to the discretion of the justices. Thus it has been left to them to decide the questions of law and fact that arise in connection with removals under the poor and sanitary legislation, the assessment of local taxes, *etc.*, *etc.* In these cases the justices act otherwise than in the foregoing cases. Their decision takes on the form, not of the conviction of a violation of the law accompanied by the imposition of the proper penalty, but rather of an order commanding that what is proper be done. Here it will be seen that the justice acts as an administrative rather than as a judicial officer.

[1] For further explanation see *infra*, II., p. 107.

[2] Wigram, *op. cit.*, 6; Probyn, *Local Government and Taxation in the United Kingdom*, 31, 32.

His action is administrative in form as well as in effect. He does not decide a controversy but orders something to be done which it is necessary shall be done in order that the government shall be carried on.[1] This is largely true of the United States also.

Finally the justices of the peace have in their courts of special and petty sessions to appoint a few unimportant officers in the localities, *e. g.* the overseers of the poor not *ex-officio* overseers and the unsalaried constables; they also have a series of powers relating to the various branches of the administration of internal affairs attended to in the localities. Thus they have even now considerable power relative to the highways though the new county council has robbed them of the most important of this class of powers.[2] They still revise and allow the list of persons liable to serve on the juries.[3] They grant licences for the sale of liquor.[4] Finally the Local-Government Act of 1888 gives the justices a large power over the administration of the police force.[5]

II.—The county.

1. *Organization of the county council.*—The English Local-Government Act of 1888, which is the last of the series of acts relating to the present system of local administration, provides that in each of the administrative counties into which England is divided[6] there shall be a county council elected, speaking broadly, by the citizens of the county who are occupiers of land

[1] Stone, *op. cit.* Part II.; *cf. infra*, II., p. 109.
[2] See 25 and 26 Vict., c. 61, and 27 and 28 Vict., c. 101.
[3] 9 Geo. IV., c. 50.
[4] 9 Geo. IV., c. 61; 35 and 36 Vict., c. 94.
[5] *Infra*, p. 243.
[6] Except the new county of London.

of a clear yearly value of ten pounds and upwards, or are occupiers of buildings of any value.[1] This county council is composed of councillors, aldermen, and a chairman, being modelled on the town council established by the Municipal Corporations Act of 1835.[2] All fit persons may be elected county councillors who are county electors, parliamentary electors, or who being non-residents still reside within fifteen miles of the county, and are occupiers of property in the county of a certain annual value, or pay a certain amount in rates for the support of the poor.[3] The term of office is three years and all the county councillors retire from office at the same time.[4] The county aldermen are one third in number of the councillors. Any person qualified to be county councillor may be county alderman, but the practice will probably be the same as it has been in the case of the municipal boroughs that only councillors will be made aldermen. The term of office of county alderman is six years, one half the number of the aldermen retiring every third year. The aldermen are elected by the council.[5]

The county chairman, who in the county takes a position similar to that of the mayor in the municipal borough, is elected in the same way by the county council from among those persons qualified to be county councillors, but if, as is probable, the practice will prevail which has been adopted in the municipal

[1] 51 Vict., c. 10; Herbert and Jenkin, *The Councillor's Handbook*, 2.

[2] 51 and 52 Vict., c. 41, sec. 1.

[3] Property of an annual value of from £500 to £1,000, or rates of from £15 to £30.

[4] 51 and 52 Vict., c. 41, sec. 2; Stephen and Miller, *The County Council Compendium*, 24, with authorities.

[5] 51 and 52 Vict., c. 41, sec. 75, and 45 and 46 Vict., c. 50, sec. 14.

boroughs, the chairman will be selected from among the aldermen.[1] His term of office is one year and he is *ex-officio* justice of the peace.[2] The chairman is the only member of the county council who may receive any remuneration.[3] His remuneration is to be fixed by the county council. Service as member of the county council does not seem to be obligatory.[4]

2. *Powers of the county council.*—The powers and duties of the county council relate first to the official service of the county and second to the administrative services of the county. The council has a large power over the organization of the county official service, though some of the offices, such as that of county treasurer, are provided for by statute. The council also appoints most of the officers of the county, may dismiss them from office, direct them how to act, and fix the amount of their salaries. The great exception to this rule is to be found in the administration of the police force of the county, which is to be attended to by a joint committee composed of an equal number of members of the council designated by it, and of an equal number of justices of the peace appointed by the court of quarter sessions. The powers of the council relating to the administrative services attended to in the county affect in the first place the general administration of the kingdom, *i. e.* are central in character. A series of acts had provided that certain matters of general concern should be attended to in the localities by various local authorities. The local-

[1] 51 and 52 Vict., c. 41, sec. 75; 45 and 46 Vict., c. 50, sec. 15.
[2] 51 and 52 Vict., c. 41, sec. 2.
[3] 51 and 52 Vict., c. 41, sec. 75; 45 and 46 Vict., c. 50, sec. 15.
[4] 51 and 52 Vict., c. 41, sec. 75, sub. sec. 16.

government act has very generally taken away from the various local authorities mentioned in these acts the power to act, and has given such power to the county council. The only important exception to this rule is that all municipal boroughs of over 10,000 inhabitants have, even since the passage of the local-government act, the same powers of this character which they possessed before. The result of this arrangement is that, for the purpose of executing these acts of general concern, the local authority is either the county council or the town council of a municipal borough which has more than 10,000 inhabitants.[1]

In the second place the county council is the authority to attend to all business which may affect the county as a corporation. As such county authority it has the power to issue a series of by-laws or ordinances of a police character, has the general supervision of all highways and the actual administration of the main roads, and finally and most important of all, has charge of the county financial administration with the power to make appropriations for certain specified objects, to levy taxes, to acquire property and to borrow money when the purpose of the loan is justified by the law. It must, however, be remembered that the principle of law governing the powers of the county council is the same as that adopted for the powers of the county authority in the United States, *viz.*, that its powers are enumerated in the acts of Parliament and that it may not exercise any power which is not thus based on statute. Parliament has not granted to the county council the general power to attend to the affairs of the county as it sees fit, with the power to

[1] For a list of these matters see Herbert and Jenkin, *op. cit.*, 41 *et seq.*

establish and maintain such institutions as it may believe are of advantage to the county. No distinction is made between general and local matters, but the powers of the county council in either of these spheres of action are alike enumerated in the statutes.

In the third place the county council has a series of powers which affect mainly the actions of the local authorities and districts beneath the county. It has already been shown that the general tendency of English development during this century has been in the direction of an administrative centralization by the formation of a strict central control over the actions of the localities and local officers. The result in 1888 was that the acts of almost all the local authorities in the lesser administrative districts were directed and controlled by the central authorities at London. This centralization was deprecated by many persons and was generally felt to have had a bad influence. Therefore the Local-Government Act of 1888 provided that the local-government board at London,[1] which was the most important central supervisory authority, may by provisional order, to be confirmed by Parliament, transfer to the county councils all powers of control possessed by it or by any other central authority over the various local authorities.[2] The Local-Government Act of 1888 also gave to the county council the power to adjust local boundaries which were in a very confused state.

[1] Formed in 1871 out of the union of the poor-law with the public health board.

[2] The probable changes that will be made as a result of the exercise of this power by the local-government board are indicated in Stephen and Miller, *The County Council Compendium*, 54. For the county generally see Anson, *op. cit.*, II., 235–238.

III.—Rural subdivisions of counties.

1. *Local chaos.*—Below the county all is confusion. The parish was at one time the only rural division below the county, but with the growth of new needs there have been formed new divisions, and in these divisions new authorities, for the satisfaction of these needs. While the parish has, as a rule, been taken as the basis of these new divisions, the relation of the parish to the county has from the beginning been so peculiar that the new divisions at the present time bear little territorial relation to the county. The parish in the first place was not always contained within one unbroken fence line. In 1873 there were in one county more than seventy divided parishes, while one parish alone had ten outlying portions.[1] When the union was formed in 1834 it was formed on the basis of the parish, *i. e.* it was to be composed of a certain number of parishes. As the parishes often crossed county lines, the necessary result is that the union often crosses county lines.[2] The rural sanitary district which was formed about 1848 was, as a rule, to be the same in territorial extent as the union. The sanitary districts were classed as urban and rural sanitary districts. The first were formed out of the second as the needs of the inhabitants demanded. That is, any aggregation of inhabitants might be formed into an urban sanitary district, which might thus embrace parts of two unions and parts of several parishes. After these urban sanitary districts had been formed all that was left of any union was denominated a rural sanitary district. Then the rural guardians of the poor were organ-

[1] Chalmers, *Local Government*, 33.

[2] One hundred and eighty one out of about six hundred and fifty unions do so. *Ibid.*, 51.

ized as the rural sanitary authority for such rural sanitary district.[1] Later came the education act, which formed all parishes or parts of parishes which were not within the limits of any municipal borough (for the parish ran through the municipal borough as well as through the county) into school districts. The municipal boroughs themselves also formed school districts. Besides these districts there are highway districts, which may be either parishes or combinations of parishes or unions or municipal boroughs, burial districts, and watching and lighting districts, which, since the establishment of the county police, are simply lighting districts, and are usually the same as the rural parishes. All these parishes may overlap, with the single exception that the poor-law parish forms an integral part of the union. On account of the non-coincidence of their areas it has been impossible to transfer all the administrative functions which are discharged within them to any one well organized authority, though the attempt has been made, as has been indicated, to consolidate several of the most important of these functions in the hands of the boards of poor-law guardians. The result of this condition of things is, in the words of Mr. Wright, that—

> the inhabitant of a rural parish lives in a parish, in a union, in a county, and probably in a highway district. He is or may be governed by a vestry, by a school board, a burial board, a highway board, the guardians and the justices. [Now the county council must be added to this formidable list]. There are a multitude of minor matters in respect of which the districts, authorities, and rates are or may be additionally multiplied and complicated in all the above cases.[2]

[1] *Ibid.*, 101.

[2] *Wright's Memorandum*, No. 1, p. 33, cited in Chalmers, *Local Government*, 21.

Nearly every one of these authorities has the power of levying taxes and very often each one has its own machinery for the collection of taxes. Mr. Goschen said in one of his speeches that he "received in one year 87 demand notes on an aggregate valuation of about £1100. One parish alone," he said, "sent me eight rate papers for an aggregate amount of 12s. 4d."[1] The system of areas and authorities has become simply a chaos; "a chaos," in the words of Mr. Goschen again, "as regards authorities, a chaos as regards rates, and a worse chaos as regards areas."

But with regard to this chaos we may lay down the following general principles which, it is hoped, will give an adequate idea of the local government which England possesses at the present time.

2. *The union.*—By the act of 1834, the poor-law parishes, which are not, however, always identical with the ecclesiastical parishes, though they generally are, are grouped into unions for the support of the poor. At the head of each union is placed a board of guardians, composed partly of *ex-officio* members, partly of members elected by the people possessing the local suffrage in the parishes.[2] The *ex-officio* members are the justices of the peace residing in the union. It is said, however, that the justices of the peace participate rarely in the administration of the affairs of the union.[3] The elected members of the board come from the various parishes within the union. Each parish at the time the union is formed is allotted a certain number of elected members whose number is determined largely

[1] Probyn, *Local Government and Taxation in the United Kingdom*, 127.
[2] Gneist, *Selfgovernment, etc.*, 727.
[3] Chalmers, *op. cit.*, 55.

by its importance. Such elected members are elected by the owners of property and rate-payers in the parish according to a system of plural voting. A ratable value of less than £50 gives one vote; a ratable value of £50 or more, and less than £100, gives two votes, and so on up to a ratable value of £250 or over, which gives six votes. A voter may vote both as owner and occupier with the result that one person may cast twelve votes but no more.[1] The guardians appoint, subject to the approval of the local-government board at London, all the necessary subordinate officers, but cannot remove them from office.[2] This power is entrusted to the local-government board, which thus has a very large administrative control over the administration of the boards of guardians. While the boards of guardians were originally established for the purpose of attending to the administration of the poor-law, since the time of their establishment they have been called upon to attend to other branches of administration. Thus in the rural sanitary districts the boards of guardians are the sanitary authorities, *i. e.* the guardians who come from the rural portions of the union act as the sanitary authority for that part of the union which forms a rural sanitary district. They also in many cases act as the rural highway authority.[3] The parishes, which were the original highway districts, have in many cases been grouped into larger highway districts and, as far as may be, the highway districts so formed have been coterminous with the unions. Where this has been done the boards of guardians

[1] Gneist, *Selfgovernment, etc.*, 723.
[2] *Ibid.*, 730; Chalmers, *op. cit.*, 54.
[3] Chalmers, *op. cit.*, 59, 109, 136.

have been given the power of attending to the highways. The actual detailed work of administration connected with the branches which have been put into the hands of the guardians is, as a rule, attended to by the officers appointed by them. The boards of guardians have in the course of time become almost entirely deliberative bodies, and their main function is to raise the money necessary to do the work which has been devolved upon them. The subordinate officers, who do almost all the detailed work, are largely under the control of the local-government board at London and, being salaried, form quite a professional service, which presents a strong contrast to the formerly decentralized non-professional administration of the justices of the peace.[1] The funds from which the expenses of the administration of the boards of guardians are paid, are obtained from local taxation —the poor-, sanitary, and highway rates—which falls upon the divisions of which the union is composed, *i. e.* the parishes, and from subsidies granted by the county council from taxes which, while collected by the central government, are paid over to the county councils for distribution among the unions and other local divisions according to rules laid down in various statutes and on receipt of the certificate of the central government that the standard of efficiency required by the central government has been maintained.[2]

3. *The parish.*—Below the union is the parish. This area, owing to the establishment of the union, has lost much of its importance. At the present time it is little more than a tax and election district for the purposes

[1] Gneist, *Selfgovernment, etc.*, 731 *et seq.*

[2] Local Government Act of 1888.

of local government. As a municipal corporation it also has the power to put in operation a series of permissive acts which have peculiar reference to the well-being of its own inhabitants. Such are for example the baths and wash-houses acts, the burial acts, the lighting and watching acts which affect at the present time only the lighting of the parishes, the public libraries acts, and the public improvement acts.[1] These acts when adopted by the parishes are carried out and executed by inspectors and boards of commissioners appointed by the parishes. The general organization of the parishes is as follows. The deliberative authority, *i. e.* the authority which decides as to the adoption of these acts and such other matters as are in the control of the parish, is the vestry. This consists of the rate-payers of the parish in vestry assembled or of a select vestry which is simply a representative body of the rate-payers. The rate-payers, where the select vestry has not been adopted, vote in somewhat the same manner as in the case of the union elections. That is each rate-payer paying on a ratable value of less than £50 has one vote, on one of between £50 and £75 two votes, and so on up to £125, so that one man have as many as six votes, but in this case no more than six votes, as no one is allowed to vote both as owner and occupier.[2] In each parish there are further two overseers of the poor who are appointed by the justices of the peace.[3] In parishes which are at the same time ecclesiastical parishes the two churchwardens, who are elected by the vestry, are *ex-officio* overseers of the poor.[4] The main duty of the overseers of the poor is no longer the administration of

[1] Chalmers, *op. cit.*, 42 and 43; Herbert and Jenkin, *The Councillor's Handbook*, 5. [2] Chalmers, *op. cit.*, 42. [3] *Ibid.*, 43. [4] *Ibid.*

the poor-relief which has gone into the hands of the guardians of the poor and their subordinate force. The main duty of the overseers of the poor at the present time is the collection of the rates which are to be paid by the rate-payers of the parish for the purpose of supporting the various branches of administration whose expense has been devolved upon the parish; and as most of the rates are tacked to the poor-rate or else the expenses of the administrative branches are actually defrayed out of the poor-rate the overseers of the poor are really the local tax collectors. In certain cases provision is made for paid assistant overseers of the poor and paid collectors of rates.[1] It must be noted that the parish organization extends through the urban as well as the rural districts, though it is rather more important in the rural than in the urban districts.[2] Finally the rural parishes are all school districts,[3] and have, where there are any public schools in the American sense of the word, a school board organized on somewhat the same plan as the board of guardians but with provision for minority representation in order to make the public schools more satisfactory to the various ecclesiastical minorities which are so common in England.[4] There is a bill before the present Parliament (1893) whose intention is to give to the parish a more representative government by the formation of an elective parish council. If it passes, the stronger parish organization resulting from it will undoubtedly lead to an increase of the functions of the parish and to a greater simplicity in the local-government institutions.

[1] *Ibid.*, 43 and 44.

[2] Since in the rural districts the parish more frequently puts into operation the permissive acts to which allusion has been made.

[3] Chalmers, *op. cit.*, 126.

[4] *Ibid.*, 127.

This bill also substitutes district councils for boards of guardians, and abolishes plural voting.[1]

IV.—Urban subdivisions of counties.

The municipalities in England are of two classes, *viz.* the boroughs or cities and the urban sanitary districts or improvement act districts. The larger boroughs or cities are exempted for almost all purposes of administration from the jurisdiction of the county authority and form counties by themselves in which the municipal authority acts as the county authority.[2]

1. *The municipal borough.*—The old borough organization has been completely remodelled and made uniform for the entire country by the Municipal Corporations Act of 1835. This act was passed after a most thorough investigation had been made of the conditions of municipal boroughs and provided a form of organization which was imposed upon all localities desiring to become municipal boroughs. At the present time the Crown may, by order in council at the request of the voters of any place, confer upon them the privileges which attach to the municipal organization. The old principle remains the same, that is, that the borough is a corporation of quite limited powers—powers which generally relate simply to local affairs. The borough organization is hardly ever made use of by the central administration as an agency for the purposes of general administration. Thus the whole care of the city poor remains in the hands of the guardians of the poor and is not attended to by the municipal

[1] *Review of Reviews*, May, 1893, 404.

[2] Local-Government Act of 1888, sec. 31, Third Schedule.

council. The same is true of the school administration. Where there are any public schools they are administered by the school board, which is elected in the school district, formed by the municipal borough, in the same way in which the school board is elected in the rural parishes. The work of the borough organization is therefore confined almost altogether to the administration of its property and to the execution of the various special powers which Parliament may have conferred upon the borough as the result of either special acts or of general acts conferring particular powers upon all boroughs. These acts cover such a wide field that the work of the municipal borough, notwithstanding that its powers are enumerated in the statutes, is very large in the domain of purely local matters—larger indeed than that of American municipal corporations.

The law of 1835 and the various laws which have been passed since that year relating to the boroughs have been, for the most part, consolidated in the Consolidated Municipal Corporations Act of 1882, which now governs the relations of the municipal boroughs. This act of 1882 simply continues the form of organization adopted by the act of 1835. The borough authority provided by the act of 1835 was the council, the same authority that had been developed in the preceding history of the English municipality. The council was then made to consist of the mayor, aldermen, and councillors. The councillors are elected by the burgesses, *i. e.* the municipal members who possess the municipal franchise. This is obtained by the paying of rates, and as rates are paid by occupiers as well as owners, every householder who has resided a certain time, to wit six months, within the municipality may

vote. The decisions of the courts as to the meaning of householder or occupier are, however, such as to shut out mere lodgers from the franchise.[1] The result is, that no one who has not a real permanent interest in the municipality is allowed to vote. Every municipal citizen is eligible for the position of councillor, as are also all persons non-resident who reside within fifteen miles and own property within the borough limits or pay a certain amount of rates.[2] The term of office of municipal councillors is three years, one third of the councillors retiring every year.[3] Municipal elections are conducted on the principle of the Australian ballot act, *i. e.* the ballot act of 1872, and voters must be registered.[4] The aldermen are one third in number of the councillors and are elected by the councillors, as a matter of fact, from their own number though this does not seem to be required by the law.[5] Their term of office is longer, being for six years, one half their number retiring every third year.[6] The mayor is elected by the town council, in fact though not necessarily by law from among the aldermen, and serves for the term of one year.[7] The mayor and the retiring mayor are *ex-officio* justices of the peace.[8] The mayor, who is merely a member of the council is the only member of the council who may receive any remuneration,[9] notwithstanding that service as municipal officer

[1] Arnold, *Municipal Corporations*, 3d edition, 83, citing L. R., 8 Q. B. D., 195; 46 L. T. R. (N. S.), 253; *cf.* Albert Shaw on "Municipal Government in Great Britain," in *Pol. Sci. Qu.*, IV., 199 *et seq.*

[2] Municipal Corporations Act 1882, sec. 11.

[3] *Ibid.*, sec. 13.

[4] *Ibid.*, secs. 50 *et seq.*

[5] *Ibid.*, sec. 14; Arnold, *op. cit.*, 70.

[6] Municipal Corporations Act 1882, sec. 14.

[7] *Ibid.*, sec. 15.

[8] *Ibid.*, sec. 155.

[9] *Ibid.*, sec. 15.

is obligatory in that quite a heavy fine is imposed upon refusal to serve.[1] Where the mayor is remunerated his remuneration is fixed in amount by the council.

The borough council has entire charge of the whole of the municipal civil service. With hardly an exception it appoints, directs, and removes all officers of the borough, and may establish such new offices as it thinks best to establish and fixes the salaries that are attached to them.[2] Further it has complete control over the strictly municipal administration, decides within the limits of the law what branches of administration shall be attended to by the borough (*e. g.* may decide to establish and maintain municipal gas-works, or means of communication within the limits of the borough such as tramways), fixes the amount of rates that are to be levied in order to support the municipal administration, and has the entire charge of the financial administration of the borough.[3] With the large grants of power affecting purely local matters there has been formed at the same time quite an extensive administrative control which is exercised by the central authorities at London over the borough officers and authorities. This administrative control is exercised for the most part by the treasury and the local-government board.[4] It will be seen from this description of the position of the town council that there has been no attempt made to distinguish between the deliberative and the purely executive or administrative

[1] *Ibid.*, secs. 34 and 35.

[2] *Ibid.*, secs. 17–21.

[3] *Local Government and Taxation in the United Kingdom*, edited by J. Probyn, 280, 281. Most of these powers have been conferred by other acts than the act of 1882.

[4] *Ibid.*, 282 and 283.

functions discharged in the borough, but that all functions of purely local administration are attended to by the one authority, the borough council. There are no executive departments like those of the American city. In order more carefully to supervise the work of detailed administrative work the council usually divides itself into committees each of which has one or more of the administrative branches to attend to.[1] Thus we find in all boroughs which still have charge of the police, the watch committee, which attends to the administration of the borough police.[2] Under each of these committees there is a subordinate officer who is to carry out the commands and directions of the council or its proper committee. Thus in the administration of the police there is a superintendent of police.[3]

Finally in addition to being the strictly borough authority the borough council is made by the public-health act of 1875 the sanitary authority and as such has the usual functions to discharge.[4] The borough is also the school district, and where there are public schools in the borough, which is often the case, there is established a school board which is separate and apart from the council and elected in the way provided for all school elections, *i. e.* by the rate-payers, provision being made for minority representation in order to allow of the representation of an ecclesiastical minority. Where, however, there are no public schools supported by the district, there is what is called a school-attendance committee of the borough council, which is to see that the compulsory-education act is

[1] Municipal Corporations Act 1882, sec. 22.

[2] *Ibid.*, secs. 190–195.

[3] Probyn, *Local Government and Taxation, etc.*, 279.

[4] *Ibid.*

enforced. This school-attendance committee is appointed in school districts, which are not at the same time municipal boroughs, by the guardians or by the local authority of an urban sanitary district.[1]

2. *The local-government district.*—England was by an act of 1872 divided into sanitary districts which are now governed by the consolidated public-health act of 1875.[2] Provision was made for rural sanitary districts and for urban sanitary districts. The former consist of such portions of the poor-law unions as have not been formed into urban sanitary districts; the latter are found in the boroughs and in all aggregations of inhabitants which have been declared by the local-government board at London to be urban sanitary districts or local-government districts. Further various special acts have also formed into urban sanitary districts, under particular organizations, other portions of the country which are then called improvement act districts.[3] As these are governed by charters peculiar to them, and as the borough has already been considered, it only remains to speak of the local-government district under the consolidated public-health act of 1875. Each of these local-government or urban sanitary districts is governed by a local board of health elected by the rate-payers and owners of property according to the general system of plural voting which has been described in what was said in connection with the union.[4] The term of office of member of the board is three years, one third of the members retiring every year. Retiring members are, however, re-eligible. Such a board has very much the same

[1] Craik, *The State and Education*, 113.
[2] Chalmers, *op. cit.*, 108.
[3] *Ibid.*, 109.
[4] *Ibid.*, 111.

powers over the district that the borough council has over the borough. In the first place the board has almost complete control over the entire subordinate personnel of the service of the district; in the second place it has to decide all matters of interest to the district, but does not in any case have charge of the police within the district, who are simply a part of the county police and under the charge of the county police authority. Like the municipal borough, the local-government district has competence only in really local matters. It has nothing to do with the general administration of the country except in so far as the sanitary administration may be considered a part of the general administration. Thus it has nothing to do with the administration of public charity which in the districts is, as in all other places, in the hands of the guardians of the poor, or with the administration of the public board schools, which are attended to by the parish organized as a school district. Its main powers have to do with the care of the streets, the beautifying of the town, and the preservation of the public health, which is its duty *par excellence*. Like the borough, the local-government district is often subject to a central administrative control. This, as in the case of the borough, affects the important acts connected with the financial administration and is so formed that, through its exercise, extravagance and unwisdom may be prevented.

V.—Central administrative control.

The central administrative control to which allusion has so often been made and which has resulted from the increase within recent years of local powers is exercised in the following ways:

1. *Necessity of central approval of local action.*—In order that certain of the acts of the local authorities may be of force it is necessary that they be approved by the central government. Thus, while the local authorities very generally have the power of issuing ordinances of a police character for the regulation of certain local matters and of sanctioning them within certain limits, as a general thing such ordinances must be approved either by the privy council, the treasury, or the local-government board before they may be enforced. The same is true of several of the most important acts connected with the local financial administration. Thus as a general thing all local loans need the approval of the treasury or the local-government board, and where a borough is permitted by such acts as the artisans' dwelling-houses acts to enter into a large scheme of local improvements the confirmation of their decision to put the acts into operation is generally necessary. In this case, as in some other instances, the confirmation is to be made by the local-government board, but has no force until it has in its turn been approved by Parliament.[1]

2. *Central audit of accounts.*—In almost all cases except that of the boroughs the accounts of the various local authorities are subject to a central audit and must for this purpose be sent in to the local-government board at London. For the purpose of auditing these accounts the local-government board has divided the country into auditing districts to each of which there is attached a district auditor under the control of the local-government board who has the right, subject to an appeal to the local-government board, to refuse

[1] Chalmers, *op. cit.*, 156.

to allow to the officer who has been spending money an allowance for money which in his opinion has been spent contrary to the provisions of the laws.[1] Accounts in the boroughs, are not, however, subject to this central audit, but are audited by the borough auditors, two of whom are elected by the municipal citizens and one of whom is appointed by the mayor and is known as the mayor's auditor.[2]

3. *Powers of compulsion.*—One of the reasons for the reform which has been made in the local-government system since 1834, was the desire to prevent any locality from escaping the burdens which were imposed upon it by the law, as the agent of the central administration, and from so neglecting such matters as were of vital interest to the people of the localities as to endanger their welfare. One of the characteristics of the central administrative control which was introduced as a result of the reform was therefore the grant of the power to the central administration to step in and force a negligent locality to perform the duties which were imposed upon it by the laws. This control is particularly strong in the poor-law administration, in the sanitary administration, and in the administration of public instruction. In the poor-law administration the local-government board has the power to lay down general rules of management which the boards of poor-law guardians are bound to observe, and to force the guardians to provide the necessary accommodation for the poor. In the sanitary administration the same body has the power to force the localities to do what it considers necessary for the preservation of the public

[1] *Ibid.*, 156 and 157.

[2] Municipal Corporations Act 1882, secs. 25 and 26.

health and in case of the refusal of the locality to obey, the local-government board has the right to appoint a temporary commission to do what is necessary and to raise the money expended by such commission by means of a rate to be levied on the rate-payers of the locality.[1] So in the matter of education. If the education department, *i. e.* the committee of the privy council for education, believes that there is not sufficient accommodation for the children of a given locality in the private schools which come up to the government requirements, it has the right to order the election of a school board, which then has the right to levy taxes and borrow money for the support of the public schools, or board schools as they are called, which are established by such school board. If the locality refuses to take the necessary action, the education department has the right to proceed as in the case of bad sanitary conditions.[2] As the borough organization proper does not, as has been said, attend to the poor-law or educational administration, and as in the case of the sanitary administration the borough council is the local authority, subject, like all local health boards, to the control of the local-government board at London, the central administration has through these powers of compulsion a pretty complete power over the administration of those matters which affect the general welfare, whether attended to in the urban or rural districts.

4. *Disciplinary powers over the local civil service.*— Besides the powers relating directly to the conduct of the administration which have been mentioned, the local-government board at London has also the

[1] Chalmers, *op. cit.*, 121.
[2] *Ibid.*, 151–154.

power of confirmation of almost all the appointments to subordinate positions in the civil service of the boards of poor-law guardians, and has the sole right to remove such subordinate officers. It was considered necessary to give to the central supervisory authority of the poor-law administration such strong powers of central control if it was to be hoped that any sort of order was to be got out of the chaos which had been the result of the uncontrolled exercise of the local powers possessed by the overseers of the poor and the justices of the peace under the old system.[1]

5. *Grants in aid and central inspection.*—In several cases the law provides for grants of money made either by the central government or by the county councils to the various local authorities in aid of an administrative service, *e. g.* the police. As these grants are made only after the particular service has been inspected by the central government, and certified by it to have attained the standard required by the law, the central administration may, by appealing to the self-interest of the localities, exercise a large control over them in the interest of administrative efficiency and uniformity.

VI.—General characteristics.

The general characteristics of the English system are the same as those of the system obtaining in the United States. That is the legislature enumerates the powers of the localities and itself exercises a great control over their actions. One important difference is, however, to be found in the way in which this control is exercised. While in the United States all local legislation is subject to about the same rules of proce-

[1] *Ibid.*

dure as are in force for all legislation, *i. e.* local bills are submitted to the proper committees which may or may not, as they see fit, give a hearing to parties interested, and are subjected to the regular number of readings, *viz.*, three; in England the absolute impossibility of the exercise by the legislature of any effective control over private and local legislation through the procedure adopted for ordinary legislation has led the English Parliament to develop a special procedure which must be followed in all cases of local legislation and to the insistence through the adoption of certain acts known as "clauses acts" upon the insertion in all special and local bills of certain important conditions. Further the rules of procedure adopted require that all parties interested in the passage of such bills shall have notice of them and that all the bills themselves shall be examined most thoroughly before particular committees, on which examination counsel are heard and witnesses examined. Finally in many cases local bills have to be approved by the local-government board at London or some other central authority. The development of this system has led to the formation of a special class in the legal profession who are known as parliamentary barristers, and whose sole occupation is the representation of parties before the parliamentary committees appointed for the purpose of examining local and private bills.[1]

The only other points in which the English system differs essentially from that adopted in the United States are: the more concentrated character of the local organization (*e. g.* in the county and borough);

[1] For a good description of the methods pursued see De Franqueville, *Le Parlement et le Gouvernement Britanniques*, vol. III., chap. xxxviii.

the greater strength of the central administrative control which has been rendered necessary by the possession by the localities of rather larger powers than those possessed by the United States localities, though it must be remembered that the same principle of the enumeration in the statutes of local powers, which is in force in the United States, is in force in England; and the greater number and more confused condition of the local areas. While in America the attempt has been made, and with generally great success, to confer almost all powers of local administration upon the county and town or some division of the town such as the school district, in England there is little coincidence of areas. Almost each branch of administration has its own area and in many cases its own administrative organization. The tendency is, however, towards a simplification of these conditions.

It is to be noticed that the system whose outline has been given, does not apply to the new county of London established by the act of 1888, whose organization differs considerably in details from that possessed by the ordinary English county; nor to the City of London, which is formally governed now very much as it was during the middle ages, and in such a peculiar way that little profit may be derived from a study of its institutions.

CHAPTER VI.

THE FRENCH SYSTEM OF LOCAL ADMINISTRATION.

I.—The continental method in general.

The continental method of providing for the participation of the localities in the work of administration is quite different from the English method. In the first place the whole work of administration is divided into central administrative work which is to be attended to in the local districts by officers regarded as central officers, and into local administrative work imposed upon the local municipal corporations and attended to by them largely in accordance with their own ideas and through their own officers, who are in many cases separate and distinct from the representatives of the central administration in the local districts, although largely subject to the control of the central officers. In this system local power is given by the legislature by general grant, but its exercise is subject to central administrative control. The legislature has never attempted to enumerate the duties of the local corporations with the same minuteness as in England and in the United States. The statutes simply lay down the general principles of local administration, leaving to the local corporations to carry them out in their details. The legislature simply says that the local cor-

porations are to attend to local affairs or that the principal authority in a given district, which is at the same time a corporation, is to control by its decisions the affairs of the particular locality. What "local affairs" means is to be derived from a perusal of the laws with the object of finding what the legislature has said shall be attended to by the central administration. All that in the nature of things may be called administration and can be attended to by the localities and has not been put into the hands of one of the central authorities is then regarded as local in character. The local municipal corporations are not therefore, as in the United States, authorities of enumerated powers, but have the right to exercise all such powers as they wish to exercise, and in the manner they see fit to adopt, provided they do not violate the letter or the spirit of the law. But they are subject to a central administrative control which is to prevent them from encroaching upon the competence of the central government and in many cases from acting extravagantly or unwisely.

In accordance with pure theory such a system of territorial distribution of administrative functions necessitates the existence of two separate sets of authorities, one for the central administrative and one for the local administrative work. The administrative districts for the purposes of central administration may or may not be the same as the districts of the municipal corporations. Seldom, however, do we find the pure theory carried to its logical results. Central authorities are often, both in France and Germany, called upon to attend to local matters at the same time that they are attending to central matters and *vice*

versa. But in almost all cases there is a clear distinction between the two spheres of local and central action even when one authority acts in both spheres. The central control over such an authority will differ according as it is attending to central or local business.

The origin of this general system is found in the feudal system which was adopted more completely on the continent than in England and in accordance with which local autonomy received the fullest recognition.[1]

II.—History of the French system of local administration.

1. *Up to the revolution.*—The territorial unity of the French state was attained many years ago. The great vassals, who under a weak monarchy might have developed into independent princes, and whose domains might then have formed separate commonwealths, were suppressed by the kings and their lands became provinces of the kingdom of France. Most matters of administration, which during the feudal régime had been attended to by the vassals, became a part of the royal administration and were attended to by the royal officers who were subject to a strong central control. These were the intendants, who date from the time of Richelieu and Louis XIII, and whose work was performed in the provinces or generalities as they were sometimes called,[2] and the council of the king at the centre which directed all their actions and heard appeals, taken by individuals aggrieved, from their decisions.[3] The great centralization of govern-

[1] *Cf.* Stengel, *Organisation der Preussischen Verwaltung*, 18 and 19.

[2] Aucoc, *op. cit.*, I., 150, 151; Déthan, *L'Organisation des Conseils Généraux*, 4.

[3] Aucoc, I., 127.

ment under the absolute monarchy left little room for any important local authorities; though we do find even in the times of the most extreme centralization that there were in certain of the provinces, called *pays d'états* and occupying a privileged position, local assemblies having more or less control over the actions of the intendants; and also that in some of the largest of the cities the people had more or less well-defined rights to elect their municipal officers, rights, however, of which the king was endeavoring in the interest of centralized government to deprive them.[1] The attempt made by the government of Louis XVI just before the revolution to introduce into all parts of the kingdom provincial assemblies modelled on the assemblies of the *pays d'états* failed;[2] and when the revolution came in 1789 it found a most highly centralized system of administration—a system which hardly recognized the local districts as anything more than administrative circumscriptions, possessing few if any corporate powers. In these districts most matters of administration were attended to by officers either appointed and removed by the king in his pleasure, or else subject to a strict central control. The system which the revolution received as a legacy from the absolute monarchy it made few radical changes in.

2. *The revolution.*—The aim of the revolution was social and political rather than administrative reform. The revolution destroyed the social system on which the absolute monarchy rested and introduced the political principle that the people should have a larger

[1] Dareste de la Chavanne, *Histoire de l'Administration en France*, Chap. VI.
[2] Déthan, *op. cit.*, 6 *et seq.*

influence in the management of the government, but it did little more in the way of permanent administrative reform than to make the system more symmetrical than it had been before. The reason why no greater change was made in the general character of the administrative system was that the revolution really aimed at the same end that had been before the eyes of the absolute monarchy. This end was the crushing out of feudalism, the taking away from the privileged classes those semi-political and social privileges and exemptions which had been the cause of so many of the miseries of the absolute monarchy, but for which the absolute monarchy was responsible only in so far as it had allowed them to continue to exist, after the duties which had been originally associated with them had been assumed by the Crown, and after the expenses which their performance necessitated had been imposed upon the tax-payers. The cause of the dissatisfaction of the people with the absolute monarchy is to be found not so much in the character of the government which it gave the people as in the fact that its progress in the desired direction of abolition of feudal privileges seemed almost to have ceased. Therefore we find that the chief reforms of the revolution were social and, to a degree, political but not administrative. The celebrated night of the fourth of August, 1789, saw the abolition at one time of about all that was left of the feudal régime, while the exemption of the privileged classes from taxation was done away with by the new and proportional system of taxation formulated and enacted by the revolutionary leaders in the constituent assembly. After the constituent assembly had thus cleared away the débris of the feudal system it would have been suicidal for it to estab-

lish any system of administration in which large rights of local government were given to the people of the localities. For the people, as a whole, were so utterly incapacitated for political work, through long administrative and governmental tutelage, that it is improbable that they could have succeeded in governing themselves well. At first it is true there was a slight attempt in the direction of decentralization, but this, as might have been expected, was unsuccessful and led to disorganization and inefficient government, as indeed did all attempts at reorganization until the government of the directory when Napoleon came into power.[1]

3. *The Napoleonic legislation.*—Napoleon is to France what the Norman kings are to England. He moulded the form of her local institutions. The laws and decrees which were passed during the period of his control of the government have, it is true, received during this century most important modifications, but the main principles of the present system of local administration are even now to be found in them. Napoleon was satisfied that the social principles of the revolution could be adhered to only through the establishment of a most centralized system of administration and government, by means of which the impulse to action should come from the centre and which should be controlled by those who were in sympathy with the new order of things. Since Napoleon's time, however, there has been great progress in the direction of decentralization. This began with the government of the restoration and reached its climax in the communes act of 1884[2]; and

[1] Aucoc, I., 151–3; Déthan, 16 *et seq.*

[2] *Cf.* Ducrocq, *Droit Administratif*, 95 *et seq.* The laws which did most in the way of decentralization are those of June 22, 1833; March 21, 1831; July 18, 1866; August 10, 1871; April 5, 1884; and the decrees of March 25, 1852; and April 13, 1861.

has consisted in the recognition of the possession by the localities, or at least the most important of the localities, of juristic personality and that there belongs to them a sphere of action of their own in which the central administration is to interfere but little. But notwithstanding the decentralization which has been going on, the French system of administration retains even at the present time quite enough of the old Napoleonic principles to make it, as compared with our own, a system which from the administrative point of view is quite centralized.

III.—The department.

The entire country is divided into departments, each of which is an administrative district for many matters of central concern and is at the same time a municipal corporation with its own affairs to attend to and its own officers to attend to many of these affairs.[1]

1. *The prefect.*—In each of these departments is placed an officer called the prefect, who is appointed and removed by the President of the republic on the proposition of the minister of the interior.[2] He receives a large salary, and, from the nature of his position, is obliged to devote his entire time to his work.[3] The prefect is thus a professional officer in that his work is his profession, but the laws do not require any special qualifications, the position being regarded as a purely political one, in the filling of which the President shall be allowed a wide discretion.[4] The prefect is at the

[1] Aucoc, I., 205.

[2] L. 28 *pluviôse, an* VIII, art. 2. This is the great Napoleonic administrative code.

[3] *Cf.* Decree Dec. 23, 1872.

[4] Block, *Dictionnaire, etc.*, 975, sec. 23.

same time the representative in the department of the central government and the executive officer of the purely local administration of the department.[1] That is he is a central and a local officer. As a central officer he is the subordinate of all the ministers of the central departments at Paris. He is to see that all the laws and decrees and central instructions sent out by the ministers are put into operation.[2] He appoints and dismisses a vast number of officers employed in the administrative services of the central government which need attention in the department. Among these officers are many who in the United States would be appointed directly by the heads of departments, *e. g.* he has to appoint all the wardens of the prisons, the less important postmasters and the letter carriers, the less important police officers, supernumeraries in the telegraph service which is a part of the post office, similar officers in the service of the direct and indirect taxes, highway overseers, teachers in the primary schools, *etc., etc.*[3] He has also a wide power of direction and control over the acts of all these officers and may remove them from office.[4] He has a large police ordinance power where the matters to be regulated are of such a character as to need uniform regulation for the entire department or for several communes therein.[5] This power of ordinance is, however, the delegated ordinance power, as his ordinances must always be based upon some statutory provision in order to have any force.[6] The prefect also represents the central government in the courts whenever it sues or is sued.[7]

[1] Aucoc, I., 155.
[2] Aucoc, I., 157.
[3] Block, *Dictionnaire*, 753, sec. 20.
[4] *Ibid.*, sec. 15 and authorities cited.
[5] L. April 5, 1884, art. 99.
[6] Aucoc, I., 159.
[7] L. 28 *pluviôse, an* VIII, art. 4.

Finally, as agent of the central government, the prefect exercises a large control over the local administration of the communes within the department.[1]

In the second place the prefect is a local officer. He is the executive officer of the local administration of the department. He appoints all the officers in the departmental service.[2] He has charge of the financial administration of the department, issuing all orders of payment on the department treasury.[3] He directs the execution of all departmental public works.[4] He draws up the departmental budget or estimate of expenses and receipts and represents the department before the courts.[5] As executive of the departmental municipal corporation the prefect is to execute the decisions and resolutions of the general council which finally determines how the affairs of the department shall be managed. As representative of the central government, however, the prefect is subject to the direction and control of the central departments at Paris.

2. *The council of the prefecture.*—By the side of the prefect is placed a council called the council of the prefecture whose members are appointed and dismissed by the President of the republic, are salaried, and may not follow any other occupation.[6] They are thus professional in character. This body is at the same time an administrative council and an administrative court. As an administrative council the council of the prefecture is called upon in many instances to advise the prefect. But while the prefect is thus bound in many

[1] Block, *Dictionnaire*, 756, art. 45.
[2] Aucoc, I., 158, 254.
[3] L. Aug. 10, 1871, art. 65.
[4] Aucoc, I., 254.
[5] L. Aug. 10, 1871.
[6] L. June 21, 1865, arts. 2 and 3.

cases to ask the advice of the council, he is never obliged to act in accordance with the advice so obtained.[1] This is in accordance with the French principle, which has already been alluded to, by which it is hoped to obtain a concentrated responsibility for every administrative act and at the same time to make it certain that the most important acts will not be performed except after proper deliberation. In addition to acting as a council of advice the council of the prefecture is in one or two cases to act independently of the prefect. Thus the commune may not undertake a lawsuit without first obtaining the consent of the council of the prefecture.[2]

3. *Departmental commission.*—Up to 1871 the prefect acted in his capacity as executive of the departmental municipal corporation subject to no permanent local control. He had, it is true, to execute the decisions of the general council of the department, but as this met usually only twice a year his actions as departmental executive were not subject to any effective control on the part of the departmental authorities. The law of August 10, 1871, which is to a large extent a code for the administration of the department, formed an authority of a more permanent character than the general council, which was not only to control the prefect in his administration of departmental affairs, but was also to perform some of the local duties of the prefect. The institution was modelled on a similar one in Belgium.[3] This is the departmental commission. This body is composed of from four to seven members and on it all sections of the depart-

[1] Aucoc, I., 163. [2] *Ibid.*
[3] Déthan, *op. cit.*, ch. I., p. 51.

ment shall, as far as possible, be represented.[1] Its members are elected by the general council of the department,[2] receive no salary, and may follow other occupations.[3] It is thus a distinctively popular authority. It meets once a month regularly and may meet as often as is necessary.[4] Its main duty is to control the administration of departmental interests by the prefect. Thus it presents to the general council its views of the prefect's estimates for departmental expenses.[5] It also examines the accounts of the prefect who has to lay before it every month all his orders of payment and his vouchers; and it makes such observations on them as it sees fit.[6] It makes an inventory of the property of the department. Its consent is necessary to the making of all important contracts for the department by the prefect and to the bringing and defending of suits to which the department is a party.[7] This control over the administration of departmental affairs by the prefect is its most important duty, but in addition thereto it has in several cases an actual power of decision in administrative matters most of which were, before the law of 1871, decided by the prefect. Thus it determines the order of priority of departmental public works, and fixes the manner of placing departmental loans when these matters have not been attended to by the departmental general council.[8] It has a series of duties to perform relative to the highways, aids in the assessment of the land tax, and appoints the members of commissions attending to works of a semi-public character which have been

[1] L. Aug. 10, 1871, arts. 69, 70.
[2] *Ibid.*
[3] *Ibid.*, art. 75.
[4] *Ibid.*, art. 73.
[5] *Ibid.*, art. 79, sec. 2.
[6] *Ibid.*, art. 78.
[7] *Ibid.*, art. 54.
[8] *Ibid.*, art. 81.

subsidized by the department.[1] Finally the general council may delegate its powers to the departmental commission.[2]

These are the executive officers in the department, and, so far as the purely departmental administration is concerned, they act mainly by executing the resolutions and decisions of the general council which really determines the character of the departmental administration.

4. *The general council.*—The general council is composed of members elected by the people of the department, one member being elected in each canton of the department.[3] The canton is little more than a judicial and election district. The general council is elected by universal suffrage.[4] All electors twenty-five years of age are eligible who have resided in a commune of the department six months.[5] One quarter of the members of the council may be non-resident provided they have an interest in the department which is evidenced by the fact of paying direct taxes or the possession of landed property therein.[6] Generally all professional officers of the government are ineligible.[7] Finally no one may be a member of two general councils.[8] The term of office is six years, one half of the members of the council retiring every third year.[9] The President of the republic may however, dissolve the general council by special decree.[10] In case he does so he must notify the legislature and must provide for an election for the fourth Sunday after the issue of the decree.[11]

[1] L. Aug. 10, 1871 *passim*.
[2] *Ibid.*, art. 77.
[3] L. Aug. 10, 1871, art. 4.
[4] *Ibid.*, art. 5; L. April 5, 1884, art. 14.
[5] L. Aug. 10, 1871, art. 6; L. April 15, 1884, art. 14.
[6] L. Aug. 10, 1871, art. 17, sec. 2.
[7] *Ibid.*, art. 8.
[8] *Ibid.*, art. 9.
[9] *Ibid.*, art. 21.
[10] *Ibid.*, art. 35.
[11] *Ibid.*, art. 36.

This body meets ordinarily twice a year,[1] but may be called together on any other occasion by decree of the President of the republic or on the demand of two thirds of the members.[2] The general council elects its own officers[3] and makes its own rules,[4] with the exception that the law fixes the quorum at a majority of its members, and provides that the ayes and the noes must be called at the request of one sixth of its members, and that the president of the council decides in case of a tie vote.[5] Its meetings finally are public[6] and its members receive no salary.[7]

The powers and duties of this body relate in the main to the affairs of the department. It does, however, have a few powers relative to matters which are general in character or to those of the communes within the department. The law which fixes its powers and duties is in form an exception to the general rule adopted upon the continent for the determination of the share of the localities in the work of administration. Nowhere in it do we find a general grant of the powers of local government to the general council. On the contrary, the law enumerates the cases in which the general council may act in the domains of both local and general administration. But in the domain of local administration the enumerated powers embrace such a wide range of subjects that what is in form an exception is not so in reality. For the law puts into the hands of the general council the control of all department property, finances, and taxes, of highways except the state roads, department public works of all kinds, public charity so far as that is a branch of

[1] *Ibid.*, art. 23. [2] *Ibid.*, art. 24. [3] *Ibid.*, art. 25. [4] *Ibid.*, art. 26. [5] *Ibid.*, art. 30. [6] *Ibid.*, art. 28. [7] *Ibid.*, art. 75.

public administration, the apportionment of the quota, which the department has to pay of the direct state taxes, among the various districts of the department, the determination of election districts, and finally gives to the general council quite a large supervision over the administration of the communes within the department.[1] It will be seen from this enumeration that, so far as the administration of affairs affecting the department interests alone is concerned, the general council has about as wide powers as if the law had simply granted to the general council, as the communes act of 1884 has granted to the communes, the general power of local government. Finally the enumeration contains instances of the grant of powers which relate not to the department administration but to the general state administration, as well as instances of supervisory powers over the administration of the communes within the department. But the general council to which these wide powers are granted has been subjected to quite an important administrative control. In one or two instances, it is true, the law has provided for a special legislative control, in that it says that if the general council wishes to exceed the limits of the taxing power which have been fixed by the general budgetary law that is passed annually, or of the borrowing power, as that is fixed by the law governing the department administration, a special law will be necessary. These are however the only instances in which the law has made express mention of any application for legislative authorization and the very mention of the fact would seem to indicate that such a practice is quite unusual in France. There are, however, many

[1] L. Aug. 10, 1871, arts. 37 and 46.

instances enumerated in the law in which the action of the general council, in order to be valid, needs the approval of the central administration. Thus where the general council desires to sell or change the use of buildings which are used for the purposes of general state administration, as *e. g.* court houses, normal schools, prefects' offices, prisons, or garrison buildings of the *gendarmerie* (police), which all belong to the department corporation, it is necessary that the resolution of the general council ordering such sale or change of use receive the approval of the central administration, which is generally given by a decree of the President of the republic.[1] Again the resolutions of the general council, deciding what the department shall pay of the expense of public works constructed by the central administration but of peculiar advantage to the department, and as to the imposition or increase by the communes of *octroi* taxes, need central administrative approval, which is usually given in the same way.[2] Finally all powers granted to the council by laws other than the law of August 10, 1871, are subject to the same central approval. While in all these cases the central administration has the right to veto the resolution of the general council on the ground that it is unwise, still the resolution of the general council is valid if the central administration does not exercise this right of veto. In certain rare cases the resolutions of the general council need, before they are valid and capable of execution, the express approval of the central administration. The most important of these is the budget. Though the general council has in a general way control over the appropriations of the

[1] L. Aug. 10, 1871, art. 48. [2] *Ibid.*

department, still the budget may not be executed until it has been expressly approved by a decree of the President of the republic. The purpose of this provision is to offer a means of preventing the general council from neglecting to provide for the expenses which have been imposed by law upon the department, *i. e.* department charges as they would be called in the United States. If the general council should so neglect or refuse, the President of the republic has the right, when the budget is presented to him, to insert in it the necessary appropriations and to provide for the levying of a special tax if that is necessary. These obligatory expenses or department charges are those necessitated by the management of those services for which the law makes it the duty of the general council to provide. They are contained in article 60 of the law of August 10, 1871; and among them may be mentioned the provision of the necessary buildings for the officers in the department, *e. g.* the prefect, the under-prefect, the department board of education, which is a council of advice to the prefect, the garrison buildings of the *gendarmerie*, the court houses, *etc.*, *etc.* It seems, however, that the President can make no changes in the budget other than to make provision for such expenses. Of course if the President finds on examining the budget that the general council has levied taxes or has resolved to borrow money in excess of the limits imposed by the law he may annul the decision or resolution thus violating the law, on the ground that the general council has exceeded its jurisdiction. In fact the President may annul any resolution of the general council which is in excess of its powers. But the decree of the President thus annul-

ling the resolution of the general council is not really a veto of its act, but is simply a formal statement that it has overstepped the bounds of its competence and that its action is therefore invalid. If the ultimate decision as to the validity of the acts of the general council lay in the hands of the President of the republic this central control might degenerate into an absolute veto of all the acts of the general council. But it would seem in accordance with the general principles of the French administrative law that an appeal may be taken from the decision of the President to the highest of the administrative courts, *viz.* the council of state, which has the right to declare the act of the President null and void in case it should deem that he had declared not within its competence a decision of the general council which really was within its competence.[1] Thus the final decision as to the jurisdiction or competence of the general council is made by the administrative courts and not by the active administration itself.

From this slight review of the powers and duties of the general council and of its relation to the central administration and government it will be seen that the initiation of almost all measures affecting the purely local affairs of the department is in the hands of the general council whose decisions may, in case it exceeds the powers granted to it by the law, be annulled by the central administration, subject to the control of the administrative courts. The general council may not, however, make such use of its powers as to neglect the

[1] See on this point decisions of the council of state of Nov. 19, 1866, reported in Dalloz, *Récueil Périodique*, 1866, Part III., 106; also Aug. 8, 1872, *Ibid*, 1872, Part III., 49; Nov. 19, 1880, *Ibid*, 1880, Part III., 34.

duties which have been imposed upon it by the law, and where the central administration is interested, as well as the department, a power of control is given to the central administration over the acts of the general council by means of which it may annul them on the ground of their inexpediency, in which case there is no appeal to the administrative courts. The statement which is sometimes made that the central government has an absolute veto over the acts of the general council is therefore not correct. On the contrary the general council has really more control over the affairs of the department than has the county authority over the affairs of the county in the United States or even in England. The great difference between the American and the French system is that while we give very few powers to the county corporation and make it necessary for the people of the county to have continual resort to the legislature for the grant of some special power whose exercise is necessary to their welfare, but seldom resort to any administrative control over the acts of the county authority, the French prefer to grant to the department authority very wide local powers but subject their exercise to a central administrative control, in order to provide some means to prevent the general council from exceeding its powers and from acting in such a way as to prejudice the interests of the state at large.

IV.—The district.

Each department is divided into *arrondissements* or districts, in each of which are placed an under-prefect and a district council.[1] The under-prefect is appointed

[1] L. 28 *pluviôse an* VIII, art. 8.

and dismissed by the President of the republic, and, like the prefect, is a professional officer. He is the subordinate of the prefect, his main duties being to carry out in the district the orders which he may receive from the prefect, though in some cases the law grants him discretionary powers.[1] There has been some talk of abolishing this office altogether on the ground of its uselessness, but two reasons have so far prevented this from being done. One of them is that the office of under-prefect is valuable as a means of educating men for the position of prefect. The other, more of a practical political character, is that the office is valuable as a means of patronage to the central government. The council of the district is elected in the same manner as the general council of the department.[2] Its functions are, however, quite unimportant and relate only to the central administration, as the district, not being a municipal corporation,[3] has really no affairs of its own to attend to. The most important function of the council of the district is to apportion among the communes in the district the quota of the direct apportioned taxes of the central government which has been apportioned to it by the general council.[4]

Both the general council and the council of the district are regarded as councils of advice to the central government, which is often obliged by law to ask their advice on matters of general administration affecting at the same time the interests of either the department or the district, though, in accordance with the French

[1] *E. g.* see decree of April 13, 1861 and law of May 4, 1864.
[2] L. July 30, 1874.
[3] L. May 10, 1838.
[4] L. May 10, 1838, arts. 40, 43, 45–7.

rule to which allusion has been made, it is never obliged to follow the advice so given.[1] In addition to giving its advice when asked, both the general council and the council of the district have the right to express their wishes to the central administration in regard to matters of peculiar interest to the section which they represent, but care is taken to prevent this power from degenerating into a mere expression of political views, as it is expressly provided in the law that expressions of the general or district council on political matters are beyond its competence, and may be declared null and void by the central administration.[2]

V.—The commune.

1. *History.*—Below the department district and canton we find the commune as the lowest administrative unit. The commune is either rural or urban, but the French law makes no formal distinction in organization between the two, both being governed by the same law, *viz.* the law of April 5, 1884. While the department is an artificial creation of the revolutionary period, the commune is a natural growth. Before the revolution we find that there were, as a result of social and political conditions, two kinds of local communities in France, *viz.* the urban communes and the rural communes. In the former were an officer, called by different names but performing for the most part executive functions, and a deliberative council. In the rural communes, and even in some of the cities, a general meeting of the inhabitants was often found together with a series of executive officers.[3] A decree of 1702 established in

[1] L. Aug. 10, 1871, art. 50; L. May 10, 1838, art. 4.
[2] L. Aug. 10, 1871, art. 51; L. May 10, 1838, art. 44.
[3] *Cf.* Dareste de la Chavanne, *op. cit.*, I., 201.

each of these rural communes an officer called a syndic, who was to act to a large extent under the supervision of the intendant of the generality or province in which the commune was situated.[1] The acts of all these authorities were subject, just before the revolution, to very strict central control, which was one of the results of the administrative centralization of the absolute monarchy. In 1789 the constituent assembly decided to efface all distinction in administrative organization between the rural and the urban districts,[2] and provided for the formation of about 44,000 communes.[3] Different experiments at organization were made in the period between 1790 and the year VIII or 1800 when the Napoleonic legislation was adopted. By this legislation there were placed in each commune a mayor and a municipal council,[4] the former attending to executive business, both that relating to the commune, which was a municipal corporation, and that affecting the state as a whole, and the latter attending simply to local business. By this Napoleonic legislation, both the mayor and the members of the municipal council were appointed and could be removed by the central administration, while the decisions of the municipal council, even though they affected simply the local affairs of the commune, were in all cases subject to the approval of the central administration.[5] Since the overthrow of the empire there has been an almost continuous tendency to decentralize this extremely centralized system. In 1831 the municipal council became elective,[6] and by a gradual process the mayor has be-

[1] Aucoc, *op. cit.*, I., 170.
[2] L. Dec. 22, 1789—Jan. 8, 1790, art. 7.
[3] Aucoc, *op. cit.*, I., 171.
[4] L. 28 *pluviôse, an* VIII.
[5] Ducrocq, *op. cit.*, I.,217 *et seq.*
[6] L. March 24, 1831.

come elected by the municipal council in all the communes of France.[1] But up to about 1884 no actual power of decision was given to the municipal council, whose resolutions were in most cases subject to central administrative approval.[2] The law of April 5, 1884, has made a most radical change in this respect by providing that the decisions of the municipal council are absolutely final except in those cases in which the law has specially provided for central administrative approval.[3]

2. *The mayor.*—In each commune at the present time are to be found a mayor and several deputies who are to assist him in the performance of his duties, all elected by the municipal council. In both cases the choice of the council is limited to its members. They serve for the term of the council, but may be suspended by the prefect of the department for one month, by the minister of the interior for three months, and may be removed by the President of the republic. Removal makes the person removed ineligible for the period of one year.[4] Further, the prefect has quite a large control over the mayor in that the law provides that if the mayor refuses to do an act which he is obliged by law to do, the prefect may step in and, after demand made to the mayor, proceed to do the act himself or may have the act done by a special appointee.[5] The mayor and his deputies are unsalaried and are not professional officers like the prefect. Their official expenses are to be paid however.[6]

[1] Boeuf, *Droit Administratif*, 276 citing L. March 28, 1882.
[2] Ducrocq, *op. cit.*, I., 219 *et seq.*
[3] Boeuf, *op. cit.*, 265.
[4] L. April 5, 1884, arts. 75–86. [5] *Ibid.*, art. 85. [6] *Ibid.*, art. 74.

Like the prefect, the mayor is at the same time the agent of the central administration in the commune and is the representative and the executive of the communal municipal corporation. As an officer of the central administration he is in most cases under the supervision of the prefect. Among his duties as such central officer may be mentioned his duty to keep a register of vital statistics. As the French law expresses it, he is an officer of the *état civil.* As such he also solemnizes all marriages.[1] He is also an officer of what is known as the judicial police and, as such, has the power to file informations in purely petty offences and may act as public prosecutor in the smaller places.[2] He has to publish and execute all the laws and decrees within the commune, makes up the election lists, the census tables for the recruiting of the army, publishes the assessment rolls, *etc., etc.*[3] Finally the mayor has a large power of local police. He has quite a large power of ordinance, a power which, like the similar power of the prefect, is always based upon some express provision of law. The power of ordinance granted by the statutes is, however, quite a general one. He has the right to issue such ordinances as may be necessary to maintain good order, public security and health. He has also a large power of issuing orders of individual and not general application, as *e. g.* to fix the building line for particular edifices, to grant building permits, to remove nuisances, and so on.[4] All such ordinances and orders are sanctioned by the penal code,[5] which

[1] Boeuf, *op. cit.*, 281.
[2] *Code d'Instruction Criminelle*, arts. 11, 48–50, and 53.
[3] Boeuf, *op. cit.*, 287; Ducrocq, *op. cit.*, I., 197.
[4] L. April 5, 1884, art. 97; Boeuf, *op. cit.* 289 *et seq.*
[5] Art. 471, sec. 15.

punishes the violation of all legal ordinances and orders by a fine. An instance of the control which the prefect has over the acts of the mayor when the latter is acting as an officer of the general state administration, is to be found in the case of these ordinances and orders which may be repealed by the prefect within a month after their issue.[1]

As the executive officer of the communal municipal corporation the mayor has the appointment of most of the communal officers,[2] the only important exceptions being found in the case of the local constabulary who are, to a large extent, central officers and under central control, the teachers, the forest guards, and the communal treasurer. Further the mayor is to attend to the detailed administration of all local property and is to supervise the different administrative services which are attended to by the commune. Thus in the financial administration of the commune the mayor draws up the budget of receipts and expenses of the commune, orders all expenses to be paid, has the detailed management of the revenue and property of the commune, executes its contracts and supervises its accounts and its public institutions.[3] But in all these matters it must be remembered that the mayor is simply to execute the decisions of the municipal council, which has the final determination of all matters of communal interest.

3. *The municipal council.*— The municipal council is elected by universal manhood suffrage. Electors must have resided for six months within the commune or have paid direct taxes there. Electors must be registered in order to be able to vote.[4] The rules in re-

[1] L. April 5, 1884, art. 95.
[2] *Ibid.*, art. 102.
[3] L. April 5, 1884, art. 90.
[4] L. April 5, 1884, art. 14.

gard to eligibility are similar to those in force for the general council of the department.[1] The term of office is four years.[2] The council has four ordinary sessions each year, but extraordinary sessions may be called at any time.[3] The meetings of the council are generally public. The mayor presides at all meetings of the council except when his accounts are being examined. As a rule a majority of the members constitutes a quorum. Finally the council may be suspended for a month by the prefect; and may be dissolved by the President of the republic.

The duties of the municipal council relate almost exclusively to the local affairs of the commune, their general duties being so few in number and so unimportant in character as not to deserve special notice. In the legal provisions governing the powers of the municipal council we find a good example of the continental method of regulating the participation of the localities in the work of administration. The law of 1884 (the municipal code of the present time) simply says that the municipal council shall govern by its decisions the affairs of the commune. In order, however, to prevent the municipal council from being extravagant or acting unwisely, article 68 of the law provides that in certain enumerated cases the approval of some central authority, as a general rule the prefect, shall be necessary, before the resolutions of the council are of force. In general this approval of the central administration is necessary for the sale or long lease of communal property, for the undertaking of expensive public works, for the change of use of buildings used for general ad-

[1] *Ibid.*, art. 31. [2] *Ibid.*, art. 41.
[3] *Ibid.*, art. 47.

ministrative purposes, for the regulation, laying out or closing of streets, for the levy of taxes above certain limits, and for the borrowing of money beyond a certain amount, and the imposition of *octroi* taxes, *i. e.* indirect taxes on objects consumed within the cities. Finally the budget of the commune must be submitted to the central administration, which must approve it before it can be executed. The purpose of submitting the budget to the central administration is to afford it an opportunity to see if the municipal council has made appropriation for the obligatory expenses made necessary by law, and to prevent the council from being extravagant. If the budget does not provide for obligatory expenses, levies taxes or borrows money beyond certain limits, or provides for the payment of the current expenses of the commune from loans or extraordinary revenue, the central administration may make changes in the budget so as to make it conform to the provisions of law or to what the central administration regards as proper. Otherwise the central administration may make no alterations in the budget as voted by the council.[1]

Finally, in order to prevent the municipal council from overstepping the bounds of its competence as an authority for the purposes of purely local administration and from assuming functions of a central character, it is provided that the central administration may declare any act of the municipal council outside of its jurisdiction to be void. In such case the municipal council or any one interested has the right to appeal from the decision, declaring the act of the municipal council void, to the administrative courts, which thus

[1] L. April 5, 1884, art. 145.

have the power of determining finally the question of local jurisdiction.[1]

It should be added finally that the municipal council is regarded as a council of advice to the central government, which in certain cases is obliged to consult it before proceeding to act. The council may further, just as may the general council of the department, express its wishes in regard to public matters, provided it does not make use of this power to create a political disturbance.[2]

VI.—General characteristics of the French system of local administration.

1. *General grant of local power.*—The French law is not nearly so specialized as is the law in the United States and England governing the powers of the local authorities. Much larger powers are granted to the localities by the legislature in France than in the United States or England. Thus a French city may adopt such institutions of local concern as it may see fit without being obliged, as is so often the case in the United States, to appeal to the legislature for power. It may, in accordance with the provisions of the general law governing the powers of communes, and on account of the general grant of local administrative power to the communes, establish municipal gas-works, or operate local tramways, though no special mention is made in the law of any such powers.

2. *Central administrative control.*—On account of the large powers granted by the legislature to the French local municipal corporations it has been thought necessary to provide a central administrative control

[1] *Ibid.*, art. 67. [2] *Ibid.*, arts. 61 and 72.

over their actions. This central control is exercised with three objects in view. In the first place, since all the local corporations or local officers are agents for the central administrative services, the central administration has the right to force the localities or local officers to act in such a way that matters of a general character placed in their charge will not suffer by their negligence or carelessness. In the second place this central administrative control is so formed that by its means the central administration may prevent any of the local corporations from so making use of their local powers as to encroach upon what is recognized as the sphere of central administration. In order, however, to prevent the central administration from so making use of its supervisory powers as to crush out all local administration, the local corporations or persons interested may appeal from the acts of supervision of the central administration to the administrative courts, which thus have the power of delimiting finally the sphere of local administration. In the third place the central administrative control is so formed as to permit the central administration through its exercise to prevent the localities from extravagance and unwise financial administration. In this last matter the central administrative control is supplemented by a central legislative control; and it may be added that this is the only instance in the French system of a legislative control like the one exercised by the United States commonwealth legislatures through special and local legislation.

Finally it is to be noticed that the system outlined above does not apply to Paris and the Department of the Seine, or to Lyons and the Department of the

Rhone, which have a special organization rather more subject to central administrative control than the system outlined.

3. *Professional character of the local officers.*—The officers who attend to the detailed work of administration are for the most part professional in character. The only important exceptions to this rule are to be found in the case of the mayor and his deputies, who, it will be remembered, are unsalaried. As a rule the unpaid officers in the French system are simply the members of the various deliberative assemblies, such as the general council and the municipal council, whose duty is to lay down general rules for the conduct of the administration of local matters, especially the matter of local finances. The administrative officers who attend to the detailed work of administration are, for the most part, salaried, devote their whole time to the public work, and are to act in all cases where the general welfare of the country is concerned in accordance with instructions issued to them from the central administrative authorities. In many cases stringent qualifications of capacity are required. This is especially true of the municipal civil service.

CHAPTER VII.

LOCAL ADMINISTRATION IN PRUSSIA.

I.—History.

1. *Conditions in 1807.*—The present form of local government in Prussia was fixed in 1807. The Prussia of the time previous to 1807 was feudal rather than modern. The collapse of feudal Prussia at the time of the French invasion in 1806 was so sudden and so complete as to prove beyond peradventure that the magnificent fabric reared with so much pains by the great Prussian kings of the eighteenth century rested on most insecure foundations.[1] The administrative system which had come down from the time of Frederick William I was bureaucratic to the last degree. The result of such a system was that the people participated hardly at all in the administration or even in the government, and naturally not only had lost all political capacity, but also had come to regard the government either with indifference or with absolute hatred. The social conditions of the Prussian people also had been such as to favor one class at the expense of the others and at the same time to impoverish the country as a whole. The distinctions of class had been so fixed as almost to divide the people into castes, and artificial barriers placed about the freedom of trade

[1] See *Pol. Sci. Qu.*, IV., 650.

and labor in the interest of the richer classes had prevented all classes alike from making the best use of their opportunities.

2. *The Stein-Hardenberg Reforms.*—After the fall of Prussia, Baron Stein was made head of the administration and during the one year of service, from which he was finally driven by the influence of Napoleon, was the director of the policy of Prussia and may well be regarded as the founder of the Prussia of to-day. Recognizing the defects of the Prussian system, he formulated and published his plan of government; and although unable during his short term of service to secure the adoption of this plan, he left to his successors a model of administrative reform in his great municipal corporations act of 1808.[1] Besides this, Stein was able to abolish serfdom, to make it possible for those not of noble blood to acquire and hold land,[2] and to introduce important reforms in the general administrative system.[3] Stein's concrete model of an administrative system was to be found in the English system as then existing.[4] But his idea of granting

[1] What Stein's ideas of government were may be seen from the famous document which the Germans have christened Stein's "political testament." This document was the circular which Stein sent to the officers of the administration when he bade them farewell on the occasion of his expulsion from Prussia at the instance of Napoleon. The reforms which he advocated therein were: the abolition of hereditary magistracy, very common in some parts of Prussia, and the transfer of all judicial and police functions to officers appointed by the king; the formation of a national legislature; and the establishment of not only the right but of the duty of all property-owning classes to participate both in the legislation and in the administration of the state. This last principle (of obligatory service) was realized in Stein's municipal corporations act of 1808. *Cf.* Bornhak, *Geschichte des Preussischen Verwaltungsrecht*, III., 4, where a portion of the text of the "testament" is to be found.

[2] Edict, October 9, 1807.

[3] Ordinance, December 26, 1808.

[4] Meier, *Reform der Verwaltungsorganisation*, 240

to the nobility large local powers, to be exercised under central control so as to prevent the abuse of the powers granted, was not adopted. The failure of Stein's plans brought Hardenberg to the front in 1810. Hardenberg's ideas were quite different from those of Stein. Hardenberg felt that before many privileges of local self-government could be granted to the people, the poorer classes in the community must be released from their economic dependence upon the richer classes.[1] He had the experience of the French before him and believed that the first thing to do was to establish a strongly centralized administration like the French, which should be directed by men of liberal ideas.[2] Hardenberg was not, however, able to overthrow what Stein had already established. As a part of his reforms Stein had divided the country into government districts (*Regierungsbezirke*), at the head of each of which was placed a board called the "government" (*Regierung*),[3] which attended to almost all central administrative matters that in the nature of things could be attended to in the localities. Purely local matters, *i. e.* matters recognized as belonging to the sphere of local autonomy, which were quite unimportant, were left in the charge of the cities and the rural communities, which were to act under the supervision of these "governments." Hardenberg suffered this organization to remain, but, in order to increase his influence over it, he put every two or three districts under a provincial governor who was to represent the central government in the province.[4] Below the dis-

[1] Bornhak, *op. cit.*, III., 6; Meier, *op. cit.*, 135, 170–172; and Seeley, *Life and Times of Stein, passim.*

[2] Ordinance, Dec. 26, 1808.

[3] Meier, *op. cit.*, 169.

[4] Ordinance, April 30, 1815.

trict Stein had retained a historic Prussian division, to wit the "circle," at the head of which was the landrath, who was now made the subordinate of the "government."[1] All of these authorities—the governor, the "government," and the landrath—were placed under the direction of the chancellor, which last position Hardenberg had created for himself. Most of the officers in this organization were salaried and professional in character. The system was therefore, as before, a centralized bureaucracy. But it was better organized than before, and it was directed by a man of advanced liberal ideas, who made use of the vast power he possessed to further the interests of the state as a whole. With this wonderfully efficient instrument great progress was made in carrying out the social and economic reforms begun by Stein.[2]

3. *Reactionary period from 1822–1872.*—But before the reform could be completed Hardenberg died (in 1822) and a reaction immediately set in. The great landholders, whose privileges had been seriously diminished by what had been accomplished, came forward and managed to persuade the king to grant them certain powers in the domain of purely local government. Local legislatures were formed in which the landholders had almost complete control[3]; and the attempt was made later to form out of delegates from these local legislatures a national parliament.[4] This attempt was frustrated by the revolution of 1848, which was largely a protest by the commercial and industrial classes against the monopoly of governing

[1] Ordinances of July 30, 1812, and July 30, 1815.
[2] *Pol. Sci. Qu.*, IV., 655.
[3] L. June 5, 1823.
[4] Patent and Ordinance of Feb. 3, 1847.

which the landholders were beginning to claim. The result of the revolution was the formation of a constitution[1] in which the suffrage was made to depend not upon the ownership of land but upon the ownership of any kind of property. At first the legislature which was formed on this basis contained a liberal majority which set to work to curtail the powers of the landowners. This led to another reaction, *viz.*, the conservative reaction of 1850–60, during which the entire power of the administration was prostituted in the interest of the Conservative party and the landholders.[2] This preying of one class upon another, which is so characteristic of the internal history of Prussia from 1822 to 1860, was largely the result of the weakness of the monarchy during that period and of the introduction of the principle of the parliamentary responsibility of the ministry into a country in which the people had not as yet learned how to govern themselves. It was only natural therefore that, when the monarchy became stronger by the accession of the late King William I, who repudiated the principle of the parliamentary responsibility of his ministers, this class tyranny should cease. The great constitutional conflict in Prussia which followed his accession to the throne (1860–4) showed the Prussian people that they had found their master, and that the Crown in a monarchial country is the natural arbiter between conflicting social classes and should protect the weak against the aggressions of the strong.

4. *Reform of 1872.*—It was seen that important changes must be made in the system of local govern-

[1] Promulgated Jan. 31, 1850.

[2] *Pol. Sci. Qu.*, IV., 656–58; Gneist in *Revue Générale du Droit et des Sciences Politiques*, Oct., 1886; Bornhak, *Geschichte, etc.*, III., 256.

ment in order to accustom the people to exercise their powers with moderation and with a regard for the interests of the minority. The necessary concrete measures were sketched by Dr. Gneist of the University of Berlin, and one of the greatest of modern public lawyers, in his little book entitled *Die Kreisordnung*. In this work Dr. Gneist referred, as had Stein before him, to the English system of local administration which they both knew so well and admired so much. After a long discussion the plans advocated by Gneist were for the most part incorporated into the law of Dec. 13, 1872, commonly known as the *Kreisordnung*. The adoption of these plans was largely due to Prince Bismarck, who believed strongly in local autonomy and self-administration, and who supported the ideas advocated by Gneist in the face of the opposition of the general public and of that of his colleagues in the ministry and the greater part of the government officials who were loth to give up any of the powers which they possessed in the organization founded by Hardenberg.[1] In addition to the *Kreisordnung* several other laws were passed in the course of the next ten years, all either carrying the reform further, or modifying details which experience had shown to be faulty.

The definite ends which this reform has had in view are:

First. The extension of the sphere of local autonomy.

Second. The introduction of a judicial control over the actions of administrative officers in the hope of

[1] As to the position and the influence of Prince Bismarck see Gneist in *Revue Générale, etc.*, Oct., 1886; *Preussen im Bundestag*, IV., 22, cited in *Pol. Sci. Qu.*, IV., 661.

preventing a recurrence of the prostitution of the powers of the administration in the interest of party or social faction.

Third. The introduction of a non-professional or lay element into the administration of central as well as of local matters in the hope of increasing the political capacity of the people.[1]

II.—Provincial authorities.

In accordance with continental ideas as to the territorial distribution of administrative functions two spheres of administrative action are recognized by the law: the one, central; the other, local. For the purposes of the central administration which needs attention in the localities, the country is divided into administrative circumscriptions called provinces, government districts, circles, *etc.*, in which are officers under the control of the heads of the various executive departments at Berlin. For the purposes of local government certain municipal or public corporations have grown up which have their own officers and their own property separate and apart from that of the central government. At the time of the reform in many instances the boundaries of the administrative circumscriptions for the purposes of central administration were not identical with those of the various public corporations, *e. g.* the boundaries of the administrative provinces were not the same as those of the public corporations bearing the same name. In most cases, further, the authorities for the purposes of central administration were not the same as those of the public corporations. The reform of 1872 has endeavored to

[1] De Grais, *Handbuch der Verfassung und Verwaltung, etc.*, 1883, 51.

simplify matters. It has in the first place adopted the old divisions, *viz.*, the provinces, districts, and circles, but it has added a new division, *viz.*, the justice of the peace division (*Amtsbezirk*); in the second place it has in almost all instances insisted upon the coincidence of the boundaries of the corresponding areas. Thus at the present time in almost all cases the area of the administrative province is the same as that of the provincial corporation. In the third place the central and local authorities within the same area have in most cases been consolidated. In the province, however, the attempts at such consolidation were unsuccessful. Therefore the provincial authorities or rather the administrative authorities in the province must be distinguished as *Behörden der Allegemeinen Landesverwaltung*, *i. e.* as authorities for central administration, and as *Organe der Provinzialverbände*, *i. e.* as authorities for local provincial administration.

Among the authorities for the general or central administration of the country are to be mentioned:

1. *The governor (Oberpräsident).*—This officer is appointed and dismissed by the king at his pleasure. He is a member of what is called the higher administrative service,[1] and is thus a purely professional officer. He is the agent in the province of the central government, *i. e.* of all the executive departments at Berlin; the permanent representative of the ministers; and from his decision as such representative there is no appeal, since the ministers are regarded as acting through him. As such agent he must report to all the ministers every year, and execute any orders which they may send to him, is entrusted with considerable

[1] *Infra*, II., p. 49.

discretion of action in times of extraordinary danger from war or other causes,[1] exercises either in first or second, but in all cases in last instance very large powers of supervision over the actions of subordinate officers and authorities, as well as over the local administration of various important municipal corporations, such as the province, the circle, and certain of the larger cities,[2] and appoints the justices of the peace (*Amtsvorsteher*).[3] He attends to the administration of all business which interests the entire province or more than one government district. For example, he issues a long series of police ordinances[4]; supervises the churches[5]; transacts all business which relates to an entire army corps[6]; acts as president of a series of provincial councils or boards, such as the provincial council, the provincial school board, and the provincial board of health.[7]

2. *The provincial council.*—Up to 1875, when the late reform was introduced into the provincial administration, the governor, himself a professional officer, transacted the business of the central government in the province unchecked in the performance of his duties by the control of any popular authority. But one of the main objects sought by the reform was the introduction of a lay element into the administration

[1] Instruction of December 31, 1825; *cf.* Stengel, *Organisation der Preussischen Verwaltung*, 317, 318.

[2] *Allgemeine Landesverwaltungsgesetz* of July 30, 1883, sec. 10, hereafter cited as *A. L. V. G.*; *Kreisordnung* of 1872, sec. 177, hereafter cited as *K. O.*; *Zuständigkeitsgesetz* of July 26, 1880, sec. 7, hereafter cited as *Z. G.*

[3] K. O., secs. 56–58.

[4] With the consent of the provincial council, of which later. A. L. V. G., secs. 137, 139.

[5] Loening, *Deutsches Verwaltungsrecht*, p. 83, with authorities cited.

[6] *Ibid.*

[7] Instruction of 1825, sec. 3; A. L. V. G., sec. 10.

of affairs affecting the country as a whole. This end was attained by the formation of the provincial council. This body consists of the governor, as its president, a single councillor of a professional character, and five lay councillors, citizens of the province, *i. e.* ordinary citizens without any professional education and unsalaried. The professional councillor is appointed by the minister of the interior, must be qualified for the higher administrative service, and his term of office is practically for life. The lay members of the council are appointed by the provincial committee—a popular body—from among the citizens of the province eligible for member of the provincial diet. Their term of office is six years.[1] In the organization of this body, it will be noticed, the lay element predominates. Provision is made for professional members in the hope that by reason of their knowledge and experience the business of the council may be more wisely and more quickly transacted.

The duties of the council are of three classes. In the first place it exercises a control over the actions of the provincial governor, *e. g.* its consent is necessary for all his ordinances.[2] In the second place it acts as an instance of appeal from certain decisions of inferior authorities, such as the district committee.[3] In the third place it decides as an executive authority certain administrative matters; *e. g.* the number, time, and duration of certain markets,[4] and questions relative to the construction of certain roads.[5] Of these duties,

[1] A. L. V. G., secs. 10–12.
[2] A. L. V. G., sec. 137; Z. G., sec. 51.
[3] A. L. V. G., sec. 121.
[4] Z. G., sec. 127.
[5] Stengel, *Organisation der Preussischen Verwaltung*, 435.

those of the first class are by far the most important, as it is through their performance that a popular lay control is exercised over the bureaucratic professional administration of central matters in the province.

3. *The government board and president.*—Each province is divided into from two to six government districts. At the head of each of these districts is a board called the government (*Regierung*). This is composed exclusively of professional officers, *viz.*, the president, several division chiefs, councillors, and assistants. They are all appointed by the central government at Berlin and, like the governors of the provinces, belong to the higher administrative service.

The competence of the governments originally (and at the time of the late reform) embraced all matters of administration that could be attended to at all by territorially limited authorities and in so far as special authorities had not been established to attend to them.[1] This last was not often the case. Separate authorities had indeed been established for the administration of the customs, but this was the most important instance.[2] In general all matters of central administration attended to in the localities were attended to by the governments. They were by far the most important administrative authorities in the entire Prussian system. They acted under the direction of the central authorities at Berlin or that of the representatives of the central authorities in the provinces, *viz.*, the provincial governors. Finally in addition to the actual administrative duties which they performed, they exercised a control over the various authorities of the central administration immedi-

[1] Ordinance of Dec. 26, 1808.

[2] Stengel, *Wörterbuch, etc.*, II., 972.

ately subordinated to them and over the various local public corporations.

With the introduction of the reform measures, however, the importance of the governments has somewhat decreased, owing to the establishment of other more popular authorities and to the modification in their own organization which thereby became necessary. In the "district committee" a lay authority was established in the government district[1] similar to the provincial council in the province. This innovation reduced the government so much in importance that it was felt advisable to abolish its most important division, that of the interior, which had charge of the police administration (*i. e.* the issue of police ordinances and orders) and of the supervision of the inferior authorities both of the central and of the local administration. All of these duties were assigned either to the government president, acting alone or under the control of the district committee, or to the district committee. For all other matters within the competence of the government the old organization is the same as before: *i. e.* in school, tax, and church matters the government still acts as a board of which the government president is the presiding officer.

The government president thus occupies a double position. He is either an officer with power of independent action, or he is the presiding officer of a board in which lies the real power of decision. But wherever he has independent powers of action, he is subjected to the control of the lay district committee, of which he is at the same time the president. The result is an extremely complicated organization—which, however,

[1] A. L. V. G., sec. 153.

answers the purposes sought by the reform. The matters left in the competence of the existing divisions of the government are matters which are not thought to be proper subjects for popular administration. The management of the domains of the state, of the central taxes and of education (*i. e.* of its pedagogical side) and the control over the churches are not regarded as subjects in which a popular control would lead to advantageous results; but the management of police matters and the supervision of the subordinate authorities, particularly of the local corporations, are matters in which it is particularly desirable that the people should have some influence.

4. *The district committee.*—This body is formed of the government president as its presiding officer, and six councillors.[1] Two of these are professional in character, are appointed for life by the king, and must be qualified, the one for the judicial service, the other for the higher administrative service. One of these professional councillors is, at the time of his appointment, designated as the deputy of the government president in his capacity as the presiding officer of the committee; he is called the administrative court director, and presides over the deliberations of the committee when it acts as an administrative court.[2] The other four members are lay members and are elected by the provincial committee from among the inhabitants of the district, not professional officers. It will be noticed that the character of this committee is the same as that of the provincial council. It is distinctively a lay authority, although it has a sufficient number of profes-

[1] A. L. V. G., sec. 28. [2] *Infra*, II., p. 253.

sional members to ensure the rapid and wise discharge of business.

While the district committee in the district subserves the same purpose as the provincial council in the province, its competence is more extended. Its main function is to exercise a control over the actions of the government president, so that the administration may be made popular in character.[1] Thus all police ordinances, the issue of which is the chief function of the government president when acting alone, need the consent of the district committee.[2] But this committee has positive functions also. In many cases it acts in first instance; *e. g.* it supervises inferior authorities and municipal corporations, especially the cities. It has also an appellate jurisdiction. This is of two kinds, one administrative and the other judicial. In what cases it acts as an administrative authority, and in what cases it acts as a judicial body, is decided by the statutes.[3] The general principle would seem to be that where rights of individuals are involved, the committee acts as a judicial body. In its double capacity of authority and court, its jurisdiction is very large; and its establishment has done much to weaken the importance of the "government," which was absolutely professional in character, and to establish the desired lay control over the administration.

5. *The provincial diet.*—Matters of purely local interest to the province—matters which the law recognizes as falling within the domain of provincial autonomy—are attended to by a second class of authorities, *viz.*, the organs of the provincial municipal corporation

[1] Z. G., sec. 13. [2] A. L. V. G., sec. 139.
[3] Stengel, *Organisation, etc.*, 330, 415.

(*Organe des Provinzialverbandes*). These authorities are the direct successors of the old feudal estates of the provinces which have come down from the middle ages. The original Stein-Hardenberg legislation did little to develop them; it was felt that the feudal elements were too strong in them to permit of any healthy development. After Hardenberg's death they received increased powers. They were so organized, however, as to put their entire control into the hands of the large owners of land. The main purpose of the reform movement has been so to reorganize them that they might be entrusted with a large part of the work which was then being done by the central administration and which was susceptible of decentralization. The main point in this reorganization is the provision for the representation of all classes of the people within the province. The old system of representation was completely done away with and the present provincial diet was established.[1] This is composed of representatives from each of the circles into which the province is divided, the number of representatives depending upon the population of the circles.[2] These representatives are elected by the circle diets of the rural circles and the municipal authorities of the urban circles, *i. e.* cities of 25,000 or more inhabitants.[3] This method of election assures the larger cities a fair representation in the provincial diet; and the method of electing members of the diets of the rural circles, is such as to guarantee to the smaller cities and the other social interests a voice in the selection of the members of these diets and, as a result, representation in the

[1] *Provinzial-Ordnung* of June 29, 1875, hereafter cited as P. O.
[2] P. O., secs. 9, 10. [3] *Ibid.*, secs. 14, 15.

provincial diet also. The term of office of the members of the provincial diet is six years; and the qualifications of eligibility are German citizenship, residence in the province or the possession of landed property therein for at least a year, good moral character and solvency.[1]

The diet is called together by the Crown once in two years and as many other times as its business makes its meetings necessary.[2] The governor of the province attends to this matter for the Crown and, as the royal representative, opens its sessions and has the right to speak therein.[3]

The functions of this body relate almost exclusively to the purely local matters of the provincial administration. It decides what local services shall be carried on by the provincial corporation in addition to those which have been positively devolved upon it by law, and it raises the funds necessary for the support of the provincial administration.[4]

> Its decisions, says Prof. Gneist, relate to the construction and maintenance of roads; the granting of moneys for the construction and maintenance of other means of public communications; agricultural improvements; the maintenance of state alms-houses, lunatic asylums, asylums for the deaf and dumb and blind and others, artistic collections, museums and other like institutions. . . . The provincial diet votes the provincial budget, creates salaried provincial offices and deliberates upon provincial by-laws.[5]

These by-laws, it must be added, simply regulate minor points in the organization of the province which have not been already fixed by law, such as the details regarding the elections. They must be approved by

[1] *Ibid.*, sec. 17. [2] *Ibid.*, sec. 25. [3] *Ibid.*, sec. 26. [4] *Ibid.*, secs. 34–44.
[5] *Revue Générale du Droit et des Sciences Politiques*, Oct., 1886, 262.

the Crown.[1] In addition to the duties imposed upon the province by law, the diet may assume such other duties as it sees fit which are not in direct opposition to the purposes of provincial organization.[2] Finally the diet elects all the officers who attend to the local administration of the province.[3]

From this description of its duties it will be seen that the provincial diet determines largely what the character of provincial administration shall be. The law, of course, imposes certain duties upon the province which it must perform and which it may be compelled to perform, but the law does not limit its competence. On the contrary the law allows it to do almost anything which falls within the scope of what is recognized as proper for provincial administration.[4] Under the new system which imposes upon the province much of the work formerly done by the central administration, and leaves it free to do as much more purely local work as it will, the widest opportunity is given for development in accordance with particular local needs.

6. *The provincial committee.*—This is the executive authority for the local administration of the province. The number of its members varies, according to the by-laws of the different provinces, between seven and fourteen.[5] They are elected by the diet from among those citizens of the empire who are eligible to the provincial diet.[6] The term of office is six years, half of the members retiring every three years.[7] The members of this committee (and the same rule applies to the members of the provincial diet) receive no pay or

[1] P. O., sec. 119.
[2] Loening, *Deutsches Verwaltungsrecht*, 219.
[3] P. O., sec. 41.
[4] Stengel, *Organisation, etc.*, 289, note; P. O., sec. 37.
[5] P. O., sec. 46.
[6] *Ibid.*, sec. 47.
[7] *Ibid.*, sec. 48.

salary of any kind for the performance of their duties: the province only pays their necessary expenses.[1]

The duties of this committee are to carry on the administration of the province in accordance with the general principles laid down by the provincial diet in its resolutions.[2] Its subordinate executive officer, on whom the detailed or current administration falls, is the provincial director (in some cases there is a board instead of a director), who is elected by the diet and must be approved by the king, and who is a salaried officer.[3] His position is that of a superintendent of the entire provincial civil service for purely local matters. He has no discretionary powers; the provincial committee is the discretionary executive of the province, and the director simply carries out its decisions. Service as provincial officer, it should be said, is never obligatory. The original draft of the bill which afterwards became the provincial law made this provincial organization less complicated than it now is, providing that the provincial committee should also perform the duties which have been devolved upon the provincial council; but the Conservative party in the House of Lords, whose interests were at stake, felt that this plan would not allow them sufficient independence in the management of purely provincial affairs, and insisted upon a complete separation of the general and local functions of administration in the province. The result was the formation of the separate authorities described above.[4]

Before closing this account of the administration of the province, it should be noticed that a large part of

[1] *Ibid.*, sec. 100. [2] *Ibid.*, sec. 45. [3] *Ibid.*, sec. 87.
[4] Stengel, *Organisation, etc.*, 150.

the revenue of the province comes from subsidies which were given by the central government to the province at the time of the reorganization of the provincial administration. The purposes for which such subsidies shall be spent are designated in the laws. In order, however, to permit the provinces to develop in accordance with their particular needs, the law provides that the provinces may raise other money by levying taxes.[1] These taxes shall consist of lump sums of money, which the circles forming parts of the province are to pay into the provincial treasury, and whose amount is to be fixed in accordance with the amount of direct taxes paid to the central government by the people residing within the circles.[2] The circle and not the individual is the taxpayer in the provincial system of finance, just as the circle and not the individual is the voter for representatives to the provincial diet. In order, however, to prevent the provincial diet from overburdening the circles, it is provided that where the province shall demand from the circle more than fifty per cent. of the amount of central taxes levied in the circle, the consent of the supervisory authority of the central government (the ministers of the interior and finance) shall be obtained.[3] The making of loans is subject to the same limitation. This is the means which has all along been adopted to restrict the actions of the provincial diet, *viz.*, a central administrative control. Thus the by-laws and resolutions which the provincial diet may adopt, filling up details in the law, often require for their validity either the approval of the Crown or that of one of the ministers.[4] Again, if any

[1] P. O., sec. 105.
[2] *Ibid.*, sec. 107.
[3] *Ibid.*, sec. 119.
[4] *Cf. supra*, p. 311.

provincial authority endeavors to do anything which is outside of its competence, the supervisory officer, *viz.*, the governor, has the right to suspend its action. Finally the Crown may dissolve the diet, and the governor may open an appropriation and levy the necessary taxes for all provincial charges for which the diet has neglected to make provision.[1] The provincial authorities may usually appeal from the decision of the supervisory authority to the superior administrative court at Berlin. The central control is thus prevented from becoming arbitrary.

III.—The circle authorities.

While the law recognizes, in the case of the circle as in the case of the province, that there is a sphere of local and a sphere of central administrative action which are quite distinct, it still has not seen fit to provide separate authorities for each of these different spheres of action, but on the contrary has conferred on the same authorities the right to act in both spheres. But when these authorities act in purely local matters, they are not subjected to the same strict control as when they act for the central administration. The work of the circle, further, is essentially local in character, while the work of the province affects rather the country as a whole. The law governing the organization of the circle authorities was the model on which was formed the law governing the provincial administration. There is, therefore, the same combination of professional and lay elements which has already been pointed out in the foregoing description of the provincial authorities. The only difference is that one

[1] P. O., secs. 121, and 122.

set of authorities performs all the duties in the circle which two sets of authorities perform in the province. The circle authorities are the landrath, the circle committee, the justice of the peace, and the circle diet.

1. *The Landrath.*—The landrath is the agent of the central administration, discharging in the administrative district of the circle about the same duties that are performed in the province by the governor, and in the government district by the government and the government president. He is the subordinate of the government president. He is at the same time the executive for the current local administration of the circle. In this capacity he is the subordinate of the circle committee, of which he is also president.[1] He is a professional officer, and must be qualified for the higher administrative service, and is appointed by the Crown.[2]

2. *The circle committee.*—The circle committee also is an agent as well for the central as for the local administration of the circle.[3] It occupies in the administrative district of the circle the same position that the district committee occupies in the government district, and the provincial council in the province. That is, it has certain executive functions to perform, and exercises a lay control over the actions of the professional landrath. In so far it acts as an authority of the central administration.[4] As local agent, it is the discretionary executive of the circle. It conducts the administration of the circle in accordance with the resolutions of the circle diet.[5] The circle committee is a distinctively lay authority. It is composed of the landrath, as its president, and of six members chosen

[1] K. O., sec. 76. [2] *Ibid.*, sec. 74. [3] *Ibid.*, sec. 130.
[4] Stengel, *Organisation, etc.*, 339, 392. [5] K. O., sec. 134.

by the circle diet from among the members of the circle.[1] The term of service is six years,[2] and the office is obligatory in that a fine is imposed for refusal to serve for at least half the regular term.[3] As an authority for the central administration it has under its direction the various justices of the peace. As the local executive authority of the circle it has under its direction the landrath and all other circle officers.[4]

The circle committee was modelled largely upon the English petty and special sessions of the peace. It performs in Prussia many of the duties, especially those of a police character, which its English prototype performed in England. Thus it is the general rural licensing authority, is a highway authority, and acts as the supervisory instance over the actions of the Prussian justice of the peace—which office is likewise constructed upon the English model.

3. *The justice of the peace.*—The office of justice of the peace is one of the most important established by the reform. One of the chief ends of the reform movement was to do away with the institution of hereditary magistracy, which existed especially in the eastern provinces of the kingdom, and under which the local police was administered by the large landholders. The purpose of the reform was to abolish this, almost the last relic of feudalism, and to put the local police into the hands of officers appointed by the Crown,—who, at the same time, should not be professional in character, but, like the English justices of the peace, should be chosen from society at large, should be obliged to serve, and should receive no salary for the

[1] *Ibid.*, sec. 131.
[2] *Ibid.*, sec. 133.
[3] *Ibid.*, sec. 8.
[4] *Ibid.*, secs. 134, 137.

discharge of these public duties. The office was to be honorary. As Dr. Gneist says:

> The principal end of the law [*i. e.*, the circle law of 1872] was, after the analogy of the English justices of the peace, to attract into the service of the state the well-to-do and intelligent classes. With this end in view the territory was divided into 5658 small divisions, each of which embraced a number of manors and townships with an average population of 1500 inhabitants. In each of these divisions are a justice of the peace and a deputy, who are appointed in the name of the Crown by the governor of the province from a list drawn up and presented to him by the circle diet. . . . The duties of the justice of the peace consist principally in the administration of the police of his division. It is he who takes police measures against vagrants, administers poor relief, prevents violations of the law; he interposes in disputes between masters and servants; he watches over the application of the building, health, and game laws and the laws passed to preserve order in hotels and public places; he supervises the maintenance and the police of highways. His orders are sanctioned by short terms of imprisonment; while he can, in necessary cases, order provisional arrest without encroaching upon the ordinary jurisdiction of the criminal courts. He supervises the daily action of the executive officers of the police force and has the right to amend all acts of theirs which in his judgment are inexpedient or incorrect. . . . The justice has under his orders the mayors of the townships and the personnel of the *gendarmerie*. He himself is not put under the disciplinary power of the landrath, but under that of a sort of a *judicium parium*—the circle committee—with a right of appeal from their decision to the courts of justice.[1]

This experiment seems to have proved a success. In the ten years immediately following the introduction of the reform there was only one case of the dismissal of a justice of the peace from office for corrupt administration. Of course the personnel of the justices

[1] Gneist in *Revue Générale, etc.*, Oct., 1886, 252. See also K. O., secs. 48, 58, 59.

of the peace must to a large extent be the same as that of the old police system—that is, the larger landholders will hold the offices. But there is a great difference between an hereditary and an appointed magistracy, even when the class from which the magistrates are taken remains the same. The power of appointment possessed by the governor makes it possible to exclude from the office any person who is notoriously actuated by class motives. Further the control possessed by the circle committee, which has the right to remove a justice of the peace, and which is not composed exclusively of representatives of the landholding classes, must tend to restrain any justice of the peace from yielding too much to class feeling.

4. *Town officers.*—The only other important officers are the *Dorfschulzen* or town-mayors. Most of the political functions of local government and also most of its important economical functions are attended to by the provincial and circle authorities. The rural towns are therefore little more than organizations for the regulation of the purely prudential matters of an agricultural community; such as common pasturage and tillage, and for the administration of a very few public services, such as the most unimportant roads, the schools, and the churches. These matters are attended to by assemblies, sometimes composed like the United States town meetings, of all the electors of the towns, sometimes formed of representatives of the electors of the towns.[1] These assemblies have the general power of controlling and regulating prudential matters of purely local interest.[2] The decisions of the assembly are enforced by executive officers—*viz.*, the village mayor

[1] Loening, *op. cit.*, 165. [2] *Ibid.*, 169.

and two *Schöffen*.[1] During the old feudal days before the reform, these offices, like the police offices, were often hereditary. Under the new legislation the mayors and *Schöffen* are to be elected by the town assemblies.[2] Their choice, however, must be approved by the landrath[3]; for the mayors, besides being the executive officers of the towns, have the general administration of the police of the state. As police officer the mayor has the right to order temporary arrest and to impose small fines for the violation of his orders.[4] Service in this office is obligatory and unpaid.[5]

Somewhat similar to the local organization of the town is that of the manor. The manor exists only in those portions of Prussia which have not as yet been completely freed from the influence of the feudal *régime*.[6] It is little more than a town which belongs wholly to one person. In the manor, in addition to the private rights which would ordinarily result from the possession of property, the lord has certain rights and duties of a semi-political character. Thus he acts as mayor; but as mayor he is subject to the control of the justice of the peace. As the justice of the peace is now subjected to the control of the circle committee, there is no longer the same danger as formerly that these semi-political powers will be abused.

One of the great obstacles to the development of an energetic and efficient local government in the towns

[1] *Ibid.*, 170.

[2] K. O., secs. 22–24.

[3] The landrath's veto, however, must be approved by the circle committee—a popular authority. K. O., sec. 26.

[4] *Ibid.*, secs. 29, 30.

[5] *Ibid.*, secs. 8, 25, 28.

[6] Stengel, *Organisation, etc.*, 234.

and manors is that they are frequently of such small size that they are unable to bear the expense of the various local services, such as roads and schools. To obviate this trouble, the reform legislation permits and encourages the union of towns and manors and the transfer of their functions to the new corporation thus formed.[1] The new division formed by such a union is often coterminous with the division of the justice of the peace (the *Amtsbezirk*). When such a union is accomplished, there is provision made for an assembly for the division. This is elected by the local electors in accordance with the three-class system adopted in Prussian municipal elections.[2] It should be noted that some sort of a similar body exists in all the divisions; but it never attains the same importance in those divisions to which the duties of the communes and manors have not been transferred, since its functions in such a case are simply to control the police administration of the justice of the peace.[3]

5. *The circle diet.*—The formation and the functions of this body are of great importance, not only because of its influence in the affairs of the circle itself, but also because it elects the members of the provincial diet and because it finally raises all the provincial taxes. Before describing the formation of the circle diet, mention must be made of the fact that the principle of universal manhood suffrage has never taken root in Prussia. This is particularly true of the system of representation in the local legislatures in both the rural and the urban districts. From time immemorial repre-

[1] See the new Landgemeindeordnung of 1890.

[2] See Bornhak, "Local Government in Prussia," *Annals of American Academy of Political and Social Science, III.*, 403. *Cf. Infra*, p. 331.

[3] K. O., secs. 48, 50, 51, 52, 53.

sentation has been regarded as a right of property, not of men. The great difficulty has been to assign a fair representation to the different kinds of property existing in the localities. Up to the time of the late reform the owners of landed property, and especially the owners of large amounts of landed property, had been able to gain for themselves a disproportionate share in the management of local matters. This it has been the purpose of the reform to do away with, but no attempt has been made to introduce the principle of manhood suffrage.

All cities of twenty-five thousand inhabitants, it must be remembered, are excluded from the jurisdiction of the rural circles and form what are termed urban circles. As these urban circles are represented according to their population in the provincial diet, moneyed capital has its representation in the provincial diet independently of the arrangements provided for the circle diets.

In the rural circles, which are composed of the open country and of cities of less than twenty-five thousand inhabitants, the circle diet is elected by the members of the circle who possess the qualifications of local suffrage.[1] Members of the rural circle are, in the first place, all physical persons who reside within its boundaries[2]; in the second place, all physical persons who, though not residing within its boundaries, own landed property therein or pursue a stationary trade or occupation therein (these are known as the *Forensen*[3]); and in the third place, all juristic persons having their domicile within the circle, including the state if it has property in the circle.[4] All of these members of the

[1] K. O., sec. 7. [2] *Ibid.*, sec. 6. [3] *Ibid.*, sec. 14. [4] *Ibid.*

circle are formed into three colleges for the purpose of electing the members of the circle diet,[1] and in each of these colleges the qualifications of the electors and the effect of their votes are different.

The first college is composed of all persons, including juristic persons, who are members of the circle and who pay for their landed property a land and building tax of at least 225 marks (this sum may be raised by the provincial diet to 450 or lowered to 150 marks), or who pay a correspondingly high trade tax for a business carried on in the open country.[2] Every German citizen who falls within this category, who is *sui juris* and has not been deprived of civil honors by judicial sentence, may cast a vote. Juristic persons, women, minors, and incapables may exercise their right of suffrage through representatives.[3] This college, it will be noticed, represents the owners of large landed estates, since land will naturally form the predominant property element in the rural circles. Persons who pay a high trade tax are assimilated to the large landowners simply in order to provide representation for the various industries which spring up in the open country.

In the second college the electing body is composed, first, of the representatives of the rural towns who have been chosen by the assemblies of such towns; second, of the owners of manors, which are assimilated to towns; and third, of those persons who pursue a trade in the circle for which they are taxed below the rate which would put them in the first college.[4] The second col-

[1] *Ibid.*, sec. 85.
[2] *Ibid.*, sec. 86. This is the middle rate of the highest class in the *Gewerbesteuer*.
[3] *Ibid.*, secs. 96, 97.
[4] K. O., secs. 87, 98.

lege, it will be noticed, is intended to represent the smaller owners of land, and also the smaller tradesmen, artisans, and manufacturers who otherwise would not be represented at all, since ownership of agricultural land is generally necessary to vote for members of the assemblies of the rural towns.[1] The representation given to the owners of manors is of course an anomaly. It is due to the fact that they are obliged by law to defray out of their own pockets all those expenses of the manors which, were they rural towns, would fall upon the inhabitants. But as the manors are fast disappearing this privilege is not destined to have great importance in the future.[2]

The third college is a common session of the municipal authorities of the cities within the circle.[3] It is therefore composed of the representatives of personal property or moneyed capital. This statement perhaps requires some explanation. From the social standpoint all city property, whether consisting of land, houses, or what the Anglo-American law terms personal property, is really to be regarded as personal property or capital. The owners treat it as capital, and their interests are those of the capitalistic class rather than those of the agricultural or rural land-holding classes.

The members of the circle diet to be elected by these three colleges are apportioned to the rural and city colleges according to population; except that the college of the cities, if there is more than one city in the circle, may not elect more than half of the members of the circle diet, and if there is only one city in the circle, then not more than one third. The other members of

[1] Loening, *op. cit.*, 165. [2] Stengel, *Organisation, etc.*, 236, note 1.
[3] K. O., sec. 88.

the circle diet—*i. e.* the number left after subtracting from the total number the number of the city college members—are to be elected in equal proportions by the other colleges; *i. e.* the college of the large landholders and that of the small landholders each elects one half of the remainder.[1] The result of such a system of representation is to assure to all classes a share of representation on both the circle and the provincial diets.[2] The processes of election differ considerably in each college, and are of so complicated and technical a character as to offer little interest to the foreign student.[3]

The authority organized in this peculiar way has to perform for the circle as a municipal corporation about the same duties that the provincial diet has to perform for the province. That is, it lays down the general rules which shall be followed by the circle officers in their management of the circle administration; decides what services the circle shall undertake; and levies the taxes necessary to defray the expenses of the circle administration and to pay to the province the quota of money which the provincial diet has decided shall be paid by the circle for the maintenance of provincial institutions and administration.[4] The raising of such moneys, it may be said, is the principal function of the circle diet.[5] In the performance of this duty the circle diet does not have any very wide field of action. One of the things which the circle law was most careful to do was to take away from the circle diets the power to introduce any new taxes, because these might easily derange the system of taxation adopted for the country

[1] *Ibid.*, sec. 89.
[2] *Cf. Pol. Sci. Qu.*, V., 145.
[3] For a description of them see Stengel, *Organisation, etc.*, 244.
[4] K. O., secs. 115, 116.
[5] *Ibid.*, sec. 119.

at large. The law has obliged the circle diet to get its revenues by adding percentages to the direct central taxes.[1] There are several of these, some upon land and some upon business and some upon income, each tax thus affecting different classes of property or persons. As capital might be especially important in one circle and landed property in another, it was not felt advisable by the framers of the reform measures to fix any hard and fast rule which the circle diets must follow in fixing the rates at which each different kind of property was to be taxed for circle purposes. But at the same time it was considered unsafe to allow the circle diets perfect freedom in the fixing of such rates, from the fear that in the circles where any particular property interest was predominant the majority would be inclined to tax unfairly the property of the minority. Therefore the law has laid down limits within which the circle diets may fix the rates of the particular taxes and beyond which they may not go.[2] Under these limitations, taken together with the careful provision for a fair representation of all the different classes of property upon the circle diet, it is felt that the temptation to local tyranny through the exercise of the taxing power is to a large extent removed. As regards the total amount of taxes to be raised by any circle, the law has imposed one limitation in the interest of economical administration. It provides that if a circle diet wishes to impose a tax which is more than fifty per cent. of the entire central tax levied in the circle, it must obtain the consent of the proper supervisory authority of the central government (in this case the ministers of finance and of the interior at Berlin).[3]

[1] *Ibid.*, sec. 10. [2] *Ibid.* [3] *Ibid.*, sec. 176.

In addition to these powers of taxation, the circle diets have a series of functions to perform, some of which are imposed upon them by law, some of which they may assume voluntarily. The circle law of 1872, in sections 115 and 116, would seem to indicate that the circle diet may establish such institutions as in its judgment will benefit the circle, and which, it must be added, are among the general objects for which the circle organization has been formed.[1] For instance: it could not establish a new system of courts, since that is not a matter of local concern; but it might establish new institutions of an educational or charitable character, since they would be of particular benefit to the circle and are within the general scope of its competence. In the establishment of such new institutions, however, the diets must not overburden the circles with debts or with heavy taxes. To prevent them from so doing, the law has reserved to the central administrative authorities large powers of control. Debts not especially permitted by law may not be incurred without the approval of these authorities; nor, as has been noted, can the circle diets impose taxes beyond certain limits.[2] The question naturally arises: What is the use of two bodies with functions so similar as are those of the provincial diet and the circle diet? Why could not the work of the province as a municipal corporation be transferred to the circle, and the circle diet be allowed to attend to all the duties which are now devolved upon the province? It must, however, be remembered that the chief function of the provinces as municipal corporations is to attend to matters of a less

[1] Loening, *op. cit.*, 204; Stengel, *Organisation, etc.*, 25.
[2] K. O., sec. 176.

local character than those which fall within the sphere of the circles; the object of their reorganization in their present form was to decentralize the central administration. Previous to the province law of 1875 and the dotation laws of 1873 and 1875 a series of institutions, such as asylums, were supported and administered by the central government, which, it was felt, could be better attended to nearer home. Therefore the central government gave these duties to the province. It could not well entrust them to the circle, because it was felt that the institutions in question were of too important a character to be attended to by so small a district; that the resources of the circle, both in administrative ability and in money, would not be sufficient for the adequate performance of these duties. While the province represents the central government in these matters, the circle represents the localities, and is by far the most important of the purely local municipal corporations.

Most of the important offices in the circle which have been mentioned are honorary and unsalaried, and the acceptance of all these honorary, unsalaried offices is obligatory.[1] That is, refusal to accept office after an election or appointment is attended, where no legal excuse exists, by loss of local suffrage for from three to six years and by an increase of circle taxes of from an eighth to a quarter. Among the legal excuses are chronic sickness, the following of a business which necessitates frequent or continuous absence from home, the age of sixty years, service as honorary officer within the last three years. This system of coercion for honorary offices, says Dr. Gneist,

[1] K. O., sec. 8.

is applied without exception in the reform legislation and had before this time been applied in the municipal organization of Prussia. The people have everywhere accustomed themselves quickly to this constraint. At first it was feared that it would be impossible to find competent persons to fill a position entailing such a grave responsibility [as that of justice of the peace]. But in 1875, after the law had been put into operation, more than 5000 justices and as many deputies were found and it was necessary to fill only 183 places with salaried officers (*commissarische Amtsvorsteher*) who were temporarily appointed for those districts in which it had been impossible to find the proper persons.[1]

The purpose of the application of the principle was to cultivate a greater public spirit and political capacity among the well-to-do rural classes in the same way that such spirit and capacity had, as it was admitted, been cultivated in the municipalities through the same principle of obligatory service as developed in the municipal corporations act of 1808.

IV.—The cities.

In order to give a complete outline of the local government of Prussia it remains to speak of the municipal organization. It will be remembered that the first steps in the great reform movement of this century were made by Stein in his municipal corporations act of 1808, which served as the model for both the circle and the province laws passed so many years afterwards.[2] Stein was able to begin the great work with the cities, because, as a result of the centralization of the eighteenth century, the social conditions of the municipal population had been made comparatively equal. The strong government of Frederick William I

[1] *Revue Générale, etc.*, Oct., 1886, 253.

[2] For a history of the development of the Prussian and German cities up to 1808, see Leidig, *Preussisches Stadtrecht*, 2–20.

had largely freed the poorer classes from economic dependence upon the richer. Though the spirit which was breathed into the new organization was quite different from that which animated the old municipal system, the actual form of municipal government, established by the new law, was in no respect very different from that which existed before Stein began his work. The changes which he made consisted mainly in the widening of the suffrage for the city council, which still remained the important organ of the municipal government; in the new obligation which was imposed upon the citizens of the municipality to take upon themselves public duties; and in the greater degree of freedom which was allowed the cities in the management of their own affairs. Since the time of Stein, some modifications have been made in his plan—modifications which may not on the whole be called improvements. They were due mainly to the desire of the Conservative party—which, with the exception of very short periods—as during 1848–50—has until recently been in complete power—to curtail the political influence of the municipal population. These modifications have consisted mainly in the strengthening of the central control over the cities, and in the limitation of their freedom of action in the management of their own affairs. In detail, the present municipal organization is as follows:

Just as in the open country, it is recognized that there is a sphere of municipal action in which the municipality should have considerable autonomy, and that there are certain functions of administration attended to within the municipal district which interest the country as a whole, and over which the central admin-

istration should have a greater control. Just as in the circle, again, it is believed to be better not to make a complete separation in the authorities which are to attend to these two different classes of duties, but to charge the executive authorities of the city with the performance of those duties which are of general concern. It is provided, however, that in the larger cities the central government may, if it sees fit, put into the hands of distinctively central organs the management of police matters[1]; and this it has done in many cases. In the smaller cities on the other hand, the city executive attends to these matters as well as to all other matters which affect the country as a whole. In these cases it is regarded as an agent of the central administration, and acts under the control of the central administrative authorities, generally the governments and the government presidents.[2] In case the city is at the same time an urban circle—which it will be remembered is the case in all cities having over twenty-five thousand inhabitants,—the city executive in like manner attends to all the duties which in the rural circles are attended to by the landrath. In these urban circles there is also a lay body, similar to the circle committee, called the city committee,[3] which, however, attends only to matters of central concern. As this city committee consists of the burgomaster of the city and of members chosen either from the town executive board, or, where there is no such board, from the town council,[4] the result is that in all cases it is the city officers who attend to the central adminis-

[1] Law, March 11, 1850, sec. 2.

[2] *Städte-Ordnung*, May 30, 1853, sec. 56, cited hereafter as S. O., 1853.

[3] K. O., sec. 170.

[4] A. L. V. G., secs. 37, 38.

tration in the city—with the exception (already noted) of the police administration in the larger cities.

1. *City council.*—But while city officers are thus generally called upon to attend to the business of the central administration in the city, the most important functions of the municipal administration are those of a distinctively local character. The general control of this local administration is vested in the city council, which is chosen by the taxpayers of the city.[1] The method of election is peculiar: it is well adapted to keep the control of the city affairs in the hands of the wealthy classes, since the influence of a man's vote depends largely upon the amount of taxes he pays. The system is as follows: The total amount of the direct taxes paid in the city is divided into three parts. Those persons paying the highest taxes, who pay one third of the entire amount, have the right to elect one third of the members of the council. Those persons who pay the next highest taxes, and who pay another third of the entire amount, elect another third of the members of the council. All the remaining taxpayers elect the remaining third.[2]

An example taken from the city of Bonn, which has a population of about thirty-six thousand inhabitants, will show how thoroughly this method of representation throws the control of the city into the hands of the wealthy classes. Out of the total number of 3,402 electors, 162 electors elected one third of the town council, 633 elected two thirds, and the remaining third was elected by 2,607 electors. The disproportion between the classes was really much greater than the above vote indicates, for while sixty-four per cent. of

[1] S. O., 1853, sec. 35. [2] S. O., 1853, sec. 13.

the electors of the first class voted, and sixty-six per cent. of the second class, only twenty-two per cent. of the third class availed themselves of their electoral privilege. The explanation is said to be this: The vote not being secret, intimidation had been practised to such an extent that the voters of the third class preferred to stay away from the polls rather than vote for candidates who were not of their choice.[1]

The authority thus formed has the absolute control of the entire city administration. The law simply says that it shall govern by its decisions the affairs of the city.[2] In addition to deciding what branches of administration the municipality shall attend to it also elects all of the executive officers of the municipality.

2. *City executive.*—The execution of the resolutions of the town council is entrusted either to a burgomaster who has complete control of the administration in its details, or to an executive board whose members are elected by the town council. In such an executive board, a part of the members are professional in character (as, for example, the school commissioner, the corporation council, the town surveyor or commissioner of public works) and a part are purely lay officers, *i. e.* ordinary citizens who are obliged to assume office if elected, and to serve at least half the regular term of six years.[3] The same obligation to serve is imposed upon those persons who are elected to be members of the town council.[4] In case the executive authority of

[1] Leclerc, "La vie municipale en Prusse," *Extrait des Annales de l'École Libre des Sciences Politiques*, 13.

[2] For example, see *Städte-Ordnung der Provinz Westphalen*, March 19, 1856, sec. 35.

[3] *Ibid.*

[4] Z. G., sec. 10.

the city is vested in a such a board, the burgomaster is simply the presiding officer and has powers little greater than those possessed by the other members of the board. But the moral influence which he exercises is nevertheless so great as very largely to determine the character of the city administration.[1] He is a professional officer and receives a large salary. In filling the position of burgomaster—or, in fact, that of any of the professional officers of the executive board—the method pursued indicates the desire of the city councils to secure the best possible men. The city council of a city which needs a burgomaster, a commissioner of public works, or any such officer, advertises in the papers for the particular officer needed, stating the qualifications which are required. The council then selects from among the applicants the one who seems best fitted for the place. A large city often chooses a burgomaster who has made his reputation as a good executive officer in a smaller city.[2] As the term of office is at least twelve years, and may be for life, the positions are much sought after, and the applicants are generally well educated men who have had experience in city administration.[3] The election of these professional officers generally requires the approval of the central administration before it is of force.[4] This is considered to be necessary on account of the many duties affecting the country at large which are devolved upon the city executive. While the executive has, in the main, to carry out the resolutions of the council, it has at the same time to exercise quite a control over the actions of this body—both to keep it

[1] S. O., 1853, secs. 57, 58. [2] Leclerc, *op. cit.*, 20. [3] *Ibid.*, 17.
[4] S. O., 1853, sec. 33; Z. G., sec. 13.

within the law and to prevent it from taking unwise action. In case of conflict between the executive and the council the matter is decided by the proper supervisory authority, in this case the district committee.[1] As this is a lay authority, the professional officers of the central administration cannot now interfere in the municipal administration. A further control exercised by the central government over the municipal administration is found in the requirement of the approval of the district committee for certain resolutions of the city council before they are regarded as valid. Among the acts subjected to such control are the more important measures of the financial administration, such as the making of loans and the imposition of high taxes.[2] The rules are much the same as those already mentioned as adopted for the communal administration of the circle and the province. In fact, the control over the circle and the province was modelled on that already formed for the municipalities by the municipal corporations act of Stein as amended by later laws.

3. *City departments.*—A word must be said in regard to the organization of the city departments which attend to the detailed current administration. The municipal corporations act of 1853 provides that for these matters there may be formed permanent commissions or boards, composed either of members of the council or of members of the executive board or of these and other municipal citizens, which boards or commissions are the subordinates of the executive and have under their direction the salaried members of that

[1] S. O., 1853, sec. 56; Z. G., sec. 17, 1.
[2] S. O., 1853, sec. 53; Z. G., sec. 16, *Abs.* 3.

body.[1] The purpose of this arrangement is to call into the service of the city as many of the citizens as possible. Service on such boards is obligatory, as is the case with all unsalaried positions in the city government. Finally the same law provides that the larger cities may be sub-divided into wards, over which are to be placed ward-overseers to be elected from among the citizens by the town council.[2] These ward-overseers are the subordinates of the executive board for all matters of municipal administration. This institution has been very generally adopted in the larger cities, where it has had excellent results. The ward overseers serve as means of communication between the different districts and the executive board. If anything goes wrong in the district, there is always some one to whom complaint may be made with the assurance that the complaint will be attended to. An example of the workings of such an institution may again be taken from the city of Bonn. This city is divided into ten wards. In each of these is an overseer who, in the administration of public charity, has under him ward commissions of citizens, whose duty it is, under his direction, to examine into all cases of demand for poor-relief. So many persons are called into the municipal service of public charity that each one of them has no more than two or three families to attend to and thus knows perfectly the condition of those asking for relief.[3] This method of administering poor relief is simply the adoption in the public administrative system of the method which has been so successfully applied in this country by private associations such as the charity organization societies and the bureaus of charity.

[1] S. O., 1853, sec. 59. [2] *Ibid.*, sec. 60. [3] *Cf.* Leclerc, *op. cit.*, 57.

V.—General characteristics of the Prussian system.

1. *Administrative control.*—As in the French, so in the Prussian system of local government, the interference of the central legislature in local affairs is infinitesimal if it exists at all. Enough of the old feudal ideas of local autonomy have remained to permit of the development of the principle that there is a sphere of administrative action which must be left almost entirely to the localities; that within this sphere the legislature should not interfere at all; that any central interference or control that may be required over this local administration should come from the administration and in the main from the lay authorities of the administration, and should be confined simply to preventing the localities from incurring too great financial burdens. Therefore the law does not, as in the United States and as it does to a certain extent in England, enumerate the powers and duties of the localities, but says simply that the local affairs of particular districts shall be governed by the decisions of local authorities in the nature of local legislatures, and that in those cases only in which the law has expressly given it the power, may the central administration step in to protect the localities from their own unwise action. This system is one of general grants of local power with the necessity in certain cases of central administrative—not legislative—approval or control. The benefits of such a system cannot be overestimated. Through its adoption all the evils of local and special legislation are avoided. In place of an irresponsible legislative control, which in the United States has shown itself so incapable of preventing the extravagance of localities that in many cases the power

of the legislature to permit local action has been curtailed by the constitutions, is to be found a control exercised by responsible authorities—authorities which have a certain permanence and are well able to judge whether a given action will be really hurtful to a locality or not. At the same time the greater freedom from central interference guaranteed to the localities by this system is well calculated to encourage the growth of local pride and responsibility.

2. *Obligatory unpaid service.*—Different, however, from the French system the Prussian system of local government attempts by the adoption of the principle of unpaid obligatory service (it will be remembered that while in many cases service in the French local offices is unpaid, it is almost never obligatory) to make the local administration largely non-professional in character. This, it was felt, was peculiarly necessary in Prussia on account of the existence of a most thoroughly bureaucratic service. This idea is adopted from England, and consciously adopted from England at a time when both forms of the English system of local government are showing a tendency to abandon it.

3. *Subjection of local administration to judicial control.*—Under the system in vogue up to the time of the late reform the administration in its local as well as its central instances was almost a law unto itself. It was not only relieved from all central legislative control, but also from all central judicial control except in so far as its acts might be considered as being regulated by the principles of the private law. The experience of Prussia during the first half of this century was, however, such as to prove that if the administration

was to be satisfactory to the individual and regardful of his rights, some sort of judicial control over it should be established. This, as has been stated, was one of the main ends of the reform movement of 1872. By the establishment of this judicial control,[1] Prussia has taken a great stride in advance, and may now be regarded as occupying, so far as her local administration is concerned, a position similar to that which has for so long a time been occupied by both England and the United States, where the actions of the local authorities are subjected to the strictest sort of judicial control.

[1] For the details in regard to it see *infra*, II., p. 243.

INDEX.

B

N

O

Q

T